APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, ETC., ET AL.,

Appellants,

v.

NANCY REMILLARD, ETC., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOCKETED JUNE 7, 1971
JURISDICTION NOTED JANUARY 10, 1972

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INDEX

DOCKET ENTRIES

DATE 1970		PROCEEDINGS
Oct.	21	1. Filed Complaint, issued summons. (3 Judge Court Requested.)
	22	File to ACW re 3 Judge Court.
	21	2. Filed order for service other than by U.S. Marshal (Clerk).
	21	3. Filed Motion for temp. restraining order.
	22	4. Filed Notice of motion that the Preliminary Injunction on for hearing at 9:30 a.m. Nov. 20, 1970.
	22	5. Filed TRO. and Plaintiff shall serve this on and no later than 1 November 1970. (ACW)
Nov.	6	6. Filed plaintiffs affidavit of service by Stephen K. Easton.
	9	7. Filed summons on ret. ex. on 10/23/70. See Dkt. #6.
	17	8. Filed stip. and order that the Hearing on Plaintiffs Motion for Preliminary Injunction is continued to 12/18/70 at 9:30 a.m. that the Temporary Restraining Order to remain in effect until Plaintiffs Motion on Preliminary Injunction is heard.
Dec.	9	9. Filed notification and certificate of three judge court.
	15	10. Filed stip. and order that the case set for hearing 12/18/70 is off Cal.
	21	11. Filed order convening 3 judge court, consisting of Judges, Oliver D. Hamlin, CJ, Albert C. Wollenberg and Samuel Conti, DJ's. (Chambers, CJ).
Jan.	20	12. Filed plaintiffs motion for TRO, un-noticed.
	20	13. Filed ORD ex TRO to Joyce Faye Dones.
	21	14. Filed ORD of subs. of party deft., Robert B. Carleson subs for Robert Martin.

DATE 1971		PROCEEDINGS
Feb.	5	15. Filed defts. ANS to complaint.
	5	16. Filed defts. notice of motion and motion for summary judgment, 2/25/71, 2 PM.
	16	17. Filed plaintiffs notice of motion and motion summary judgment and opposition to defendants notice of motion and motion for summary judgment, 2/25/71, 2 PM.
	25	18. Filed defendants opposition to plaintiffs cross-motion for sum judgment.
	25	ORD after hearing, motions for summary judgment submitted.
Mar.	31	19. Filed ORD granting declaratory judgment and Injunctive relief and dissenting opinion of Judge Conti. (Cys mailed) (Hamlin, Wollenberg).
Apr.	7	20. Filed defendant's notice of appeal to Supreme Court.
	7	21. Filed defendant's request for preparation, cert. and transmission of entire record to Supreme Court.
	7	22. Filed defendant's motion to stay injunction pending appeal. Mailed Clerk's notice of appeal.
	8	23. Filed plaintiffs opposition to motion to stay injunction pending appeal.
	13	24. Filed stay of execution of order granting inj. relief. (Hamlin, Wollenberg & Conti)
	13	Made, Mailed Record on Appeal to Supreme Court of the United States by Certified Mail Receipt No. 224326.
	22	25. Filed STIP re record on Appeal.
	26	26. Filed receipt from U.S. Supreme Court for record on appeal.

DATE 1971	PROCEEDINGS
June 18	27. Filed letter from U.S. Supreme Court that case has been docketed, #1794.
Aug. 9	28. Filed Supreme Court ORD: Stay of Inj. Order granted by U.S.D.C. for Northern Calif. is vacated pending consideration of appeal now pending before this Court. In event jurisdiction is noted, this stay is to continue in effect; in event appeal is dismissed, this stay is to terminate automatically.

INDIVIDUAL & CLASS ACTION FOR DECLARATORY JUDGMENT AND INJUNCTION, INJUNCTIVE RELIEF SOUGHT (COMPLAINT)

In the United States District Court for the Northern District of California

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CIVIL ACTION DOCKET NO. C-702273ACW

NANCY REMILLARD, etc., et al. *Plaintiffs,*

vs.

ROBERT MARTIN, etc., et al. *Defendants.*

THREE JUDGE COURT REQUESTED

INTRODUCTION

This is an action for injunctive relief authorized by 42 U.S.C. § 1983 to redress the deprivation of rights, privileges, and immunities secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, by the Social Security Act, 42 U.S.C. § 601-609, by the Civil Rights Acts, 42 U.S.C. § 1981-1994. This is also a suit for a declaratory judgment pursuant to 28 U.S.C. § 2201, and for the return of money illegally withheld.

JURISDICTION

1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1343(3). Plaintiff also invoke the pendent jurisdiction of this Court.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. § 2281 in that it seeks an injunction to restrain the defendant officers and employees of the State of California from enforcing or executing a state Aid to Families with Dependent Children (AFDC) regulation on the grounds that the regulation is invalid under the Constitution of the United States. The regulation prohibits the payment of AFDC benefits to the families of servicemen on the basis of the "continued absence" of the serviceman from his home.

3. Plaintiffs seek a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that to exclude the families of servicemen from AFDC benefits on the ground that the husband and father, although physically separated from his family, is not "continually absent from the home" violates the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constiution; violates 42 U.S.C. §§ 602 (a) (10), 606 (a), 1981-1983, and California Welfare and Institution Code section 11250.

PARTIES

4. Plaintiff Nancy Remillard is, and at all relevant times has been, the parent and general guardian of the following minor plaintiff:

Name	Age	Date of Birth
Karen Marie	1½	January 14, 1969

These plaintiffs are citizens of the United States and residents of the State of California residing in the City of San

Pablo, County of Contra Costa. Mrs. Remillard is the person lawfully entitled to receive and administer AFDC payments under the Social Security Act upon satisfying valid state regulations. She sues on behalf of said child and in her own rights.

5. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated, pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable and plaintiffs can fairly and adequately protect the interest of the class. There are questions of law and fact common to the class and their claims and defenses are the same. The defendants have acted on grounds generally applicable to this class, making appropriate injunctive and declaratory relief with respect to the class as a whole.

6. The plaintiffs represent a class of mothers and children, residents of the State of California, who have applied for payments under the AFDC program, who are otherwise entitled to such payments, but who have been denied such payments due to a regulation of the defendants that the absence of a father for military service does not constitute "continued absence from the home" which is required by the Social Security Act as an eligibility factor.

7. The named defendants are: Robert Martin, Director of the California State Department of Social Welfare; under California Welfare and Institutions Code Sections 10553 and 10554 he is responsible for the management of the California Department of Social Welfare and is the only person authorized to adopt regulations, orders, or standards of general application and implement, interpret or make specific the law enforced by the California Department of Social Welfare; the State Department of Social Welfare is, under W & I Code §§ 10600, 10603 and 10604 the single state agency with full power to supervise the

Aid to Families with Dependent Children Program and establish regulations not in conflict with the law for the administration of the program; Robert Jornlin, Director of the Contra Costa County Department of Social Services; under California W & I Code §§ 10802 and 10803 he is charged with the administration of the Aid to Families with Dependent Children Program in Contra Costa County; Lois Lee, Social Worker Supervisor, Contra Costa County Department of Social Services; Susan Giordano, Social Worker, Contra Costa County Department of Social Services; Helen Kornguth, Eligibility Worker, Contra Costa County Department of Social Services; John Gibson, Social Worker Supervisor, Contra Costa County Department of Social Services; defendants are sued in their capacities as agents and employees of the State of California.

THE AFDC PROGRAM

8. California participates in the Federal Government's AFDC program, which was established by the Social Security Act of 1935. The Act's purpose is to aid needy children who have been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent.

9. The State of California, in order to receive Federal funds for the AFDC program, is required to submit a plan to the Secretary of Health, Education and Welfare (HEW). The plan must conform to the Social Security Act, to regulations promulgated by HEW, and to the Constitution of the United States.

DEFENDANTS WRONGFUL ACTS

10. It is the policy of the defendants, once a child is determined to be "needy", to then determine whether or not the child is "deprived of parental support or care."

The defendants policy declares that needy children are "deprived of parental support or care" when a parent is dead or when a parent is disabled from employment. Further, their policy considers children "deprived of parental support of care" when there is "continued absence" of a parent from the home. For example, needy children are eligible on the basis of continued absence when—

a. a parent is incarcerated;
b. a parent is confined, for example in a mental institution;
c. a parent has been deported;
d. a parent has deserted;
e. a parent has been divorced or separated from another parent;

11. The purpose of these provisions is plain: to aid needy children where an individual, usually the father, who owes them a duty of support is (a) continuously absent from the home, and (b) unable or unwilling to meet his duty of support.

12. The father of the plaintiff Remillard child is Gregory Remillard. On May 31, 1969 he enlisted in the United States Army. In March, 1970 he reenlisted for five years. He was stationed in Fort Lewis, Washington for eighteen weeks. He was then sent to Fort Hood, Texas where he was stationed until May, 1970. On July 2, 1970 he was sent to Vietnam where he is now stationed and where he will remain until reassigned by the United States Army in July, 1971.

13. Claimant Nancy Remillard first applied with Contra Costa County Department of Social Services for AFDC benefits on or about December 16, 1969. At that time claimant was denied AFDC benefits by defendants Susan Giordano and Lois Lee on the basis of State Department of Social Welfare Manual Section 42-350.1 which read:

"Continued absence from the home exists if the parents are living separate and apart, and the parents are separated without legal action, or a parent has deserted, and a clear dissociation of one or both parents from the normal family relationship exists."

On or about September 10, 1970 claimant NANCY REMILLARD again applied with Contra Costa County Department of Social Services for AFDC benefits. At that time Plaintiff was denied AFDC benefits by defendants Helen Kornguth and John Gibson on the basis of Social Welfare Manual Section 42 350 which was amended, effective February 9, 1970 to read, in part, as follows:

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

14. Nancy Remillard and Karen Marie Remillard are now in desperate need. Until September, 1970 they received an allotment check in the amount of $130.60 per month. During September and October, 1970 they received no allotment. In September, 1970 the Contra Costa County Department of Social Services gave the Remillard Family $41.00

from their General Assistance Fund and the American Red Cross gave the family $89.00. On or about October 5, 1970 Mrs. Hoffman, Social Worker Supervisor, Contra Costa County Department of Social Services notified the Red Cross that said Department would not give Mrs. Remillard any more money. At that time the Red Cross loaned Mrs. Remillard $130.60. The California Department of Social Welfare estimates the amount necessary to maintain a family with one adult female and one infant to be $111.00 plus the cost of housing. Mrs. Remillard pays $30.00 per month for low-income housing.

15. The defendants, acting under California Welfare and institutions Code sections 11250, 10553, 10554, and 10604 have adopted and implemented the "continued absence from the home" regulation which excludes from its coverage the absence of fathers due to military service.

16. At all relevant times herein the defendants have been acting under color of state law.

FIRST CAUSE OF ACTION

17. The "continued absence from the home" regulation deprives plaintiffs of the equal protection of the law, in that it discriminates without any valid legislative purpose against needy children whose fathers are in the Armed Services and who are thus absent from the home due to military service and in favor of needy children whose fathers are absent from the home for other reasons.

SECOND CAUSE OF ACTION

18. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

19. The "Continued absence from the home" regulation violates the Due Process and Privileges and Immunities

Clauses of the Fourteenth Amendment to the United States Constitution, in that: the regulation embodies a conclusive presumption that a father who has enlisted in the armed forces is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational; which presumption further has the effect of burdening needy families on the basis of the father's performance of a federal duty of serving his country in the armed forces; and which presumption further has the effect of burdening needy children on the basis of their father's legal status, over which they have no control.

THIRD CAUSE OF ACTION

20. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

21. The "Continued absence from the home" regulation deprives the plaintiffs of rights protected by the Social Security Act, in that: it defines "continued absence from the home" in a way inconsistent with 42 U.S.C. § 606 (a) and federal regulations promulgated thereunder by HEW. By promulgating a regulation inconsistent with § 606 (a), the Defendants have breached the obligation imposed by 42 U.S.C. 602 (a) (10) of the Act that AFDC "shall be furnished with reasonable promptness to all eligible individuals."

FOURTH CAUSE OF ACTION

22. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

23. The "continued absence from the home" regulation violates California W & I Code §§ 11250 and 10604 in that: it defines that term in a way inconsistent with § 406 (a) of the Social Security Act and federal regulations promulgated thereunder by HEW.

THE INJURY TO PLAINTIFFS

24. Plaintiffs are now suffering and will continue to suffer irreparable injury and deprivation of the essentials of human existence by reason of their being excluded from AFDC payments and coverage under the California Medical program. They have immediate and dire need of the moneys to which they are entitled by federal law. Without them, they will be unable to adequately feed, clothe, and shelter themselves during the pendancy of this action.

25. Plaintiffs have no plain, adequate or speedy remedy at law to obtain such payments and the suit for injunctive relief is their only means of securing such relief.

26. The action of the defendants has already deprived the plaintiffs of payments to which they were entitled for December 1969 through October 1970, for which they applied and were refused. Unless enjoined, the defendants will continue to deprive the plaintiffs of the money to which they are entitled in the month of November, 1970, and each and every month thereafter and will inflict irreparable injury upon them.

27. There is an actual controversy now existing between the parties to this action as to which plaintiffs seek the judgment of this court. Plaintiffs seek, pursuant to 28 U.S.C. §§ 2201, 2202 a declaration of the legal rights and relations in the subject matter in controversy.

PRAYER

WHEREFORE, plaintiffs respectfully pray this Court:

1. to convene a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284, to determine this controversy:

2. to order that the action may be maintained as a class action;

Plaintiffs respectfully pray the three-judge court when convened:

3. to enjoin the defendants from continuing to withhold AFDC payments from the plaintiff class on the grounds that they are not deprived of parental support or care by reason of the absence of their fathers in the United States Army;

4. to enter a declaratory judgment that the policy of excluding the children of servicemen from AFDC benefits on the grounds that they are not deprived of parental support or care by the continued absence of a parent, now sanctioned by State Department of Social Welfare Manual 42-350, violates the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; violates the Social Security Act, 42, U.S.C. §§ 602 (a) (10), 606 (a); violates California W. & I Code 11250.

5. to order the defendants to release AFDC payments illegally withheld from members of the class from the date of their incorrect action;

6. to grant such other relief as may be just and proper.

Dated: ....., 1970.

CONTRA COSTA LEGAL SERVICES FOUNDATION

CARMEN L. MASSEY

[Affidavit of Service omitted in printing.]

MOTION FOR TEMPORARY RESTRAINING ORDER

In the United States District Court for the Northern District of California

[Title omitted in Printing]

No. C-70 2273 ACW

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the complaint and other pleadings filed in this case and the affidavits filed in support of this motion, plaintiff moves this honorable court for a temporary restraining order enjoining defendants, their successors in office, agents and employees from withholding AFDC benefits from plaintiff on the grounds the service of her husband in the Armed Services does not constitute "continuous absence" from her home.

The plaintiff further shows to this honorable court:

(1) In this action plaintiff has moved for a preliminary injunction to enjoin defendants from denying AFDC benefits on the basis that the absence of a parent from the home due to his service in the Armed Forces does not constitute "continued absence."

(2) Plaintiff is a needy family within the definition of the California State Department of Social Welfare so as to make her otherwise eligible for AFDC benefits.

(3) Plaintiff has according to California Department of Social Welfare Standards, been existing at a below subsistance level since December, 1969. As of November, 1970, to the best of her knowledge she will have no money for the subsistance of herself and her child.

(5) Plaintiff's affidavit filed in this matter makes it clear that unless benefits are resolved immediately she and

her family will not be able to purchase the basic necessities of life. There is simply no way to avoid irreparable injury short of granting to her the AFDC benefits to which she is entitled.

Respectfully submitted,

CONTRA COSTA LEGAL
SERVICES FOUNDATION
CARMEN L. MASSEY

[Brief in Support of Motion omitted in printing]

AFFIDAVIT

[Title omitted in Printing]

AFFIDAVIT

[IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER]

I, NANCY REMILLARD, the undersigned, having been duly sworn, do depose and state that:

On May 31, 1969 my husband, GREGORY REMILLARD, enlisted in the United States Army. At that time the Contra Costa County Department of Social Services gave me AFDC benefits in the amount of $148.00 per month for approximately two months. In August or September of 1969, I began receiving an allotment in the amount of $130.60 for the support of myself and my minor child. I notified the Department of Social Services of this allotment and I was informed that I was no longer eligible for AFDC benefits.

The California State Department of Social Welfare has published a AFDC Cost Schedule For Family Budget Units which states that a family of my composition living in Contra Costa County needs a minimum of $111.00 plus the cost of housing in order to exist at a safe, decent standard. I live in low-income housing which costs me $30.00 per month. This means that I need a minimum of $141.00 per month to cover my basic needs.

As my allotment of $130.60 was insufficient to cover the cost of my basic needs, I reapplied for AFDC benefits in December, 1969. At that time I was told I was ineligible for AFDC benefits because my husband was in the Armed Forces.

In September, 1970 my allotment was stopped. The Red Cross has been working on my case to get my allotment back, but they cannot tell me when or if I will get my allotment. In the meantime, the County of Contra Costa has given me $41.00 from their General Assistance fund and the Red Cross has given me $89.00 and loaned me $130.60 but neither source will be able to give me any more money.

Every month I have at least the following expenses:

Rent	$ 30.00
Utilities	10.00
Telephone	8.00
Laundry	10.00
Car	25.00
Gas	10.00
Clothes	10.00
Food	50.00
	$153.00

In addition, I sometimes have emergency expenses such as repairs of appliances. If I do not pay my rent, I will be evicted and I will not be able to find any other housing that is so cheap. If I do not make the payments on my car, it will be repossessed and I will have no means to take my child to the doctor or to do my shopping.

I have no source of income other than my allotment which I have not received for two months. My parents are unable to give me any financial help and I have no relative or friends who are able to give or loan me money.

I declare under perjury that the foregoing is true and correct.

NANCY REMILLARD

[Notarization omitted in printing]

MOTION FOR A PRELIMINARY INJUNCTION

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

[Title omitted in Printing]

[NOTICE OF MOTION OMITTED IN PRINTING]

Upon the Complaint and other pleadings filed in this case and the affidavits filed in support of this motion, plaintiff moves this honorable court for a preliminary injunction:

(a) Enjoining defendants, their successors in office, agents and employees from denying AFDC benefits to plaintiff and the classes she represents on the grounds that the absence of a parent from the home due to service in the Armed Services does not constitute "continuous absence".

(b) Ordering defendant to immediately restore to plaintiffs and the class they represent all AFDC benefits that have been withheld from them on the basis of State Department of Social Welfare Manual Section 42-350 from the time such benefits have been so withheld.

Plaintiff further prays that this court will allow her costs and grant such other and further relief as may be equitable, just, and proper.

Respectfully submitted,

CONTRA COSTA LEGAL
SERVICES FOUNDATION
CARMEN L. MASSEY
Attorney for Plaintiff

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

[Title omitted in Printing]

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This case involves the question of whether California may lawfully or constitutionally refuse to grant Aid to Families with Dependent Children (AFDC) benefits to needy families where the absence of a parent is due to his military service. This case does not involve the question whether plaintiff's family is needy as the family clearly falls within California's definition of what constitutes a needy family.

CALIFORNIA'S REFUSAL TO GRANT AFDC BENEFITS WHERE FATHER OF NEEDY CHILD IS ABSENT FROM THE FAMILY DUE TO HIS SERVICE IN THE ARMED SERVICES VIOLATES THE FEDERAL SOCIAL SECURITY ACT.

The categorical public assistance program of Aid to Families with Dependent Children operates through a federal grant-in-aid mechanism being financed largely by the federal government and administered by the states. States have no obligation to participate in the AFDC program, but if they do, they are required to administer their programs in accordance with the definitions, conditions, and statutory purposes set forth in Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 601-610. *King v. Smith* 392 U.S. 309, 316-317 (1968). As the Court in *King* said:

"There is, of course, no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the State shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." 392 U.S. at 333, Note 34 (citations omitted)

42 U.S.C. 606(a) defines the term "dependent child" as a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who is living with certain specified relatives and who fulfills certain age requirements.

42 U.S.C. 602 (a)(10) provides that a State plan for aid and services to needy families with children must "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

In this case we are concerned with that particular part of 42 U.S.C. 606(a) which provides that a child is "dependent" if he has been deprived of parental support or care due to the "continued absence from the home" of a parent. There is no question but that the plaintiffs in this case are needy. The sole question is whether or not there is "continuous absence from the home" of such parent, such as to qualify plaintiffs for AFDC benefits.

The HEW Handbook of Public Assistance Administration, Part 4, Section 3422 provides:

3422. *Continued Absence of the Parent From the Home*
3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for depriva-

tion of parental support or care under the following circumstances;

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or military service,* and imprisonment.

3422.4 *Federal Financial Participation.*—Federal participation can be claimed when the fact of absence has been established and the effect of this absence is to deprive the child of support or care.

Upon the return of a parent whose children have been receiving aid to dependent children, Federal participation will be available for payments made for a temporary period during which the effects of

the absence are still continuing, as that period of "continuing effects" is defined under State agency instructions.

In regards to the particular question posed in this case, Mr. Jules H. Berman, Chief, Division of Program Payment Standards in the Department of Health, Education and Welfare, has more specifically stated:

> Absence in military service is considered as "continued absence." Federal financial participation is thus available for AFDC payments for otherwise eligible children whose father is absent from the home in military service."

A copy of this written statement is attached to this brief and marked Exhibit "A."

Section 11250 of the California Welfare & Institutions Code provides

> "Aid, Services, or both shall be granted under the provision of this chapter, and subject to the regulations of the department to families with related children under the age of 18 years, except as provided in Section 11253 (having to do with children over 16) in need thereof because they have been deprived of parental support or care due to: (b) The divorce, separation or desertion of a parent or parents and resultant continued absence of a parent from the home for these or other reasons."

Yet, allegedly acting under sections §§ 10553 and 10554 of the California Welfare & Institution Code, the Director of the California State Department of Social Welfare has adopted regulations which, prior to February 9, 1970, were interpreted to prevent payment of AFDC benefits to families in which the absence of a parent is based upon his military service, and which, effective February 9, 1970, specifically excluded such payments. Copies of these rules are attached hereto and marked Exhibit "B" and Exhibit "C".

The state is not free to impose additional restrictions on the receipt of AFDC benefits. (*King v. Smith,* supra) The state is not free to define "continued absence" in a manner inconsistent with the federal act and HEW regulations. In *Damico v. California,* No. 46538, N. D. California, (September 12, 1969), this court decided that California Welfare regulations which stated there was no "continued absence" due to separation unless the applicant had either filed a legal action or the separation had lasted three months were in conflict with 42 U.S.C. 606 (a) and the primary purposes of the AFDC Program. A similar result was reached in *Doe v. Hursh,* Civ. No. 4-69-403 (D. Minn, June 30, 1970). See also *Doe v. Shapiro,* 302 F. Supp. 761, (D. Conn 1969), *Appeal Dismissed* 396 U.S. 488 (1970) in which the court held the state cannot condition receipt of AFDC upon a parent's naming the putative father of an illegitimate child. Section 42-350 of the California State Department of Social Welfare manual has no more validity than did the regulation in *Damico.* Like the "90 day rule" involved in that case, Section 42-350 is an impermissible restriction on the availability of AFDC benefits to needy families in California. While the federal definition requires only" continued absence from the home California's definition requires that the absence be for other reasons than military service. It should be noted that the military service exception cannot be viewed as a general exclusion from eligibility of families in which parental absence is voluntary, since eligibility is granted in cases of voluntary absence due to separation, divorce, or desertion. Nor may the exception be viewed as a general exclusion of cases in which the absent parent's intent is to return to his family at some later date, since such intent may well be present in cases in which eligibility is granted on the basis of incarceration, confinement, mutual separation or desertion. Nor may the

exception be viewed as a general exclusion of cases in which the absence is for a set time as opposed to an unknown time as eligibility is granted in cases where a parent is in jail for a particular period of time. The military service cases are probably closest to those cases in which a parent is absent from the home due to incarceration. In both cases the family may be "psychologically intact," and there may be an "intent to return to the home after a set period," and there may be an impossibility of the family living together due to governmental action. If plaintiff's husband were serving a year long jail sentence, she would be eligible for AFDC. Because he is spending a year serving in the Armed Forces in Vietnam, she is not so eligible.

Just as California's military service exemption finds no counterpart in the language of the Social Security Act, there is nothing in its legislative history to indicate that when Congress said "continued absence from the home" it meant "continued absence from the home except by virtue of military service." President Roosevelt, in recommending the permanent entry of the federal government into the field of public assistance, referred to "children deprived of a father's support" as those who should be aided by a federal grant-in-aid program. Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 29 (1935). Similarly the House Committee on Ways and Means referred in general terms to the beneficiaries of Title IV as "those [children] in families lacking a father's support," H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935), and the Senate Committee on Finance made reference to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). (The Senate Committee went on to note that "These are principally families with female heads who are widowed, divorced, or deserted," *id*,

but neither stated or implied that eligibility by virtue of parental absence was to be limited to cases of divorce or desertion.)

The result is very simple:

> "Under the Social Security Act, a child is eligible for and entitled to AFDC assistance if he is both 'needy' and 'dependent.' . . . A child is 'dependent' if a parent is continually absent from the home." *Doe v. Shapiro;* supra at 764.
>
> "While [the state] is free to set its own standard of need and to determine the level of benefits, once a child is found to be without a parent and in need, he is eligible for AFDC benefits." *Doe v. Hursh,* supra.

California's military service exception has the effect of carving out a group of children who come within the federal definition of "dependent child" set forth in 42 U.S.C. 606(a) and denying them eligibility for AFDC benefits because of something their father has done, *i.e.* become a member of the Armed Services. "The protection of such (dependent) children is the paramount goal of AFDC." *King v. Smith,* 392 U.S. at 325. Regulations must be analyzed in light of that paramount goal. The question of deprivation "must focus on the child, not on the legal status of the parents." *Damico v. California,* supra. In this case, Karen Marie Remillard has been deprived of the presence of her father for over a year. This deprivation will continue at least until July, 1971. Surely, it matters not to her why her father is gone; the only relevant factor is that he is "continuously absent."

In *King v. Smith,* supra, the Court did not treat the federal eligibility definition as representing only the outer limits of federal financial participation. Rather, the Court was concerned with defining that group of individuals that Congress intended the Federal Act to cover, the resulting

conclusion being that all those within that group must be granted eligibility by the state. The *King* rationale—that state-imposed definitions and eligibility requirements inconsistent with 42 U.S.C. 606(a) are invalid as a violation of the requirement of 42 U.S.C.(a)(10)—has been followed by a number of district courts. *Doe v. Shapiro,* supra.; *Cooper v. Laupheimer,* Civ. No. 69-2421 (E.D.Pa., April 16, 1970); *Evans v. Houston,* No. 7013 (Mich. Ct. Apls., March 25, 1970); *Doe v. Hursh,* supra. That rationale is inescapably applicable here; California's military service exception is equally as inconsistent with the absent parent component of 42 U.S.C. 606(a) as was Alabama's "substitute father regulation" in the *King* case and thus is equally violative of the mandate of 42 U.S.C. 602(a)(10) that AFDC "be furnished with reasonable promptness to all eligible individuals."

CALIFORNIA'S DENIAL OF ELIGIBILITY FOR AFDC TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED FORCES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason. Solely on the basis of this difference, the first class is denied and the second class is granted "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life." *Shapiro v. Thompson,* 394 U.S. 618, 627 (1969). Unless there is, at least, some rational reason to support this

classification, it must fall as a violation of the Equal Protection clause of the United States Constitution.[1]

It is difficult to imagine what basis the state could have for denying assistance to the needy families of absent servicemen when it grants that same assistance to the needy families of prisoners and deportees. If the reason is to discourage service in the military when the absence from the home and the reduction in income would render the family incapable of meeting their needs as defined by Public Assistance standards, then the action is patently invalid as being overbroad in that the California regulation not only prohibits payments to needy families of absent enlistees, but also payments to needy families of draftees.

However, Plaintiff argues that the state may not constitutionally inhibit military service that is entered by any means. While it is not specifically spelled out in the Constitution that there is a right to military service, it has long been judicially recognized as self-evident that

> "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need . . ." *The Selective Service Draft Law Cases* 245 U.S. 366, 375 (1918)

The obligation of service being a necessary correlative of citizenship, the right to fulfill that obligation voluntarily must be equally inherent in citizenship.

The right to military service is similar to the right to travel which also is not mentioned directly in the Constitution, but which has been recognized as "a right so elementary [it] was conceived from the beginning to be a neces-

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1. It will be shown that, whether one uses the "rational basis test" or the "compelling state interest test," the discrimination must fall.

sary concommitant of the stronger Union the Constitution created." *United States v. Guest,* 383 U.S. 745, 757-758; quoted in *Shapiro v. Thompson,* supra, at 630-631. The right to serve in the Armed Forces of one's native country is equally "a right so elementary" and a concommitant not only "of the stronger Union the Constitution created," but of nationhood itself.

In *Shapiro v. Thompson,* supra, which case invalidated waiting-period requirements for welfare benefits, the Court said:

> ". . . . even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause." (638)

See also *Skinner v. Oklahoma* 316 U.S. 535, 62 S. Ct. 1110 (1942) (right to procreate); *Levy v. Louisiana* 391 U.S. 68 (1968) (right to recover for wrongful death); *Rinaldi v. Yeager,* 384 U.S. 305 (1966) (right of appeal); *Carrington v. Rash* 380 U.S. 89 (1965) (right of servicemen to vote).

If California's classification is based upon its desire to protect its treasury, this likewise is not sufficient basis for denying benefits to needy families of absent servicemen. As was said in *Shapiro v. Thompson,* supra:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its program. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other

program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . in the cases before us appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs canot justify an otherwise invidious discrimination." (633)

The Supreme Court's most recent statement on the relation of the equal protection clause to welfare benefits is *Dandridge v. Williams* 397 U.S. 471. In that case the Court held that a maximum family allowance to recipients of AFDC did not violate the Equal Protection clause even though children in large families received less AFDC money than children in small families. That case, however, is easily distinguishable from the present case. In that case the Court differentiated previous equal protection cases by stating: "here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment *only* because the regulation results in some disparity in grants of welfare payments to the largest AFDC families."

In this case it is claimed the California regulation imposes also on the right to military service. *Dandridge* in no way changed the holding of *Shapiro,* supra, that where basic rights are involved, the state must justify the discrimination by showing a compelling state interest. (See *Dandridge,* Note 16)

It should also be noted that, in the *Dandridge* case, every family was receiving *some* money, whereas, in this case, Plaintiff's family has been *completely* excluded from AFDC benefits.

Even if this court were to hold that only the "rational basis test" applies in this case, it is submitted that there

is no rational basis for excluding needy families of absent military men from AFDC benefits. As was stated earlier in this brief, this discrimination may not be justified on the basis the absence of the father is "voluntary" as the regulation applies to draftees as well as enlistees and aid is granted where the absence is voluntary due to divorce or separation; on the ground the family is "psychologically intact" as this may often be true in cases where the husband is in jail, in an institution, or has been deported; on the basis the absence is not "continued" as military service is frequently of longer duration than a jail term, a period of committment or a separation; or on the ground the family could live with the absent parent if it so chose as Plaintiff is not free to join her husband who is in a War Zone.

Applying either test, California's regulation denying AFDC benefits to needy families of absent servicemen should be found violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

CALIFORNIA'S DENIAL OF ELIGIBILITY FOR AFDC TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED FORCES VIOLATES THE DUE PROCESS AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT

As outlined in the section on equal protection, it can scarcely be denied that the right to serve in the Armed Services is inherent in national citizenship. This is not to imply that the Armed Services must allow every volunteer to serve, regardless of age, health or the needs of the nation, but rather to state that the right to military service is a privilege and immunity secured by national citizenship which cannot be infringed upon by the states.

In *Crandall v. State of Nevada* 6 Wall. 35, 18 L. Ed. 744, the majority opinion stated:

> "The people of these United States constitute one nation . . . This government has necessarily a capital established by law . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." 6 Wall at 43-44.

In *In re Siem,* 284 F. 868, 869 (D. Mont. 1922) the Court stated:

> "The distinguishing and supreme obligation of citizenship and its permanent allegiance is military service. It has its antecedents in the feudal system wherein the vassal makes oath of fealty to his lord and services him in war, as a consideration and payment for the land and protection he receives from his lord. So the citizen . . . likewise renders military service to the country in payment of and consideration for the advantages, rights and protection it extends to him."

In *Edwards v. California,* 314 U.S. 160, 185 (1941), Mr. Justice Jackson, in his concurring opinion, stated: "Rich or penniless, [Duncan's] citizenship under the Constitution pledges his strength to the defense of California as part of the United States . . ."

Any law that clearly impinges upon a fundamental right must be shown to reflect a *compelling* governmental interest or it must fall under the Due Process Clause of the Fourteenth Amendment. *Shapiro v. Thompson,* 394 U.S. at 644. "[T]o justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected rights . . . a . . . subordinating interest of the State must be compelling.

NAACP v. Alabama 357 U.S. 449, 463, 78 S. Ct. 1163, 1172.

Furthermore, the California regulation in question here is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational. Plaintiff is prepared to offer evidence that her husband is continuously absent from the home so as to qualify her for AFDC benefits. To deny her the right to basic subsistence because of California's rule that her husband is not continuously absent because he is absent due to military service constitutes a denial of due process as guaranteed by the Fourteenth Amendment.

Respectfully submitted

CONTRA COSTA LEGAL SERVICES FOUNDATION
By CARMEN L. MASSEY
Attorney for Plaintiff

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE [Letterhead]

March 30, 1970

Mr. Michael Weiss
Staff Attorney
Center on Social Welfare Policy & Law
401 West 117th Street
New York, New York 10027

Dear Mr. Weiss:

In your letter of March 18, you asked about Federal policy considering a parent's absence for military service as constituting continued absence for AFDC purposes.

Absence in military service is considered as "continued absence." Federal financial participation is thus available for AFDC payments made for otherwise eligible children whose father is absent from the home in military service.

The essential elements in determination of a parent's continued absence are that the parent be out of the home and the absence interrupts or terminates his "functioning as a provider of maintenance, physical care, or guidance for the child." The Federal policy is contained in the Handbook of Public Assistance Administration, Part IV. section 3420.

Sincerely yours,

/s/ JULES H. BERMAN
Chief, Division of Program
Payment Standards

EXHIBIT B

State Department of Social Welfare Manual
Section 42-350.1

(effective until February 8, 1970)

Continued absence from the home exists if the parents are living separate and apart, and the parents are separated without legal action, or a parents has deserted, and a clear dissociation of one or both parents from the normal family relationship exists.

EXHIBIT C

SPECIAL ELIGIBILITY

CALIFORNIA-SDSW-MANUAL-EAS

Regulations

DEPRIVATION OF PARENTAL SUPPORT OR CARE

AFDC

42-350 CONTINUED ABSENCE OF A PARENT

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits,

trips made in connection with current or prospective employment, active duty in the Armed Services.

.12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 *Circumstances That Meet the Definition of "Continued Absence"*

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

.21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinment in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

.23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

.24 The court has issued an injunction forbidding the parent to visit the spouse or child.

.25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.

.26 Both parents are physically out of the home and their whereabouts are not known.

[Statement of Service omitted in printing]

TEMPORARY RESTRAINING ORDER

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

NANCY REMILLARD, et al.

Plaintiff,

vs.

ROBERT MARTIN, et al.

TEMPORARY RESTRAINING ORDER

Having considered the above motion for a Temporary Restraining Order, the Affidavit filed herein and the Complaint and other pleadings filed in this action and in order to prevent serious irreparable injury to plaintiff:

It Is Hereby Ordered that defendants, their Successors in Office, agents and employees are restrained from denying AFDC benefits to plaintiffs Nancy Remillard and Karen Marie Remillard on the basis the absence of Gregory Remillard from the home does not constitute "continuous absence".

It Is Further Ordered that the motion for a preliminary injunction in this matter shall be heard 20 Nov. 1970 at 9:30 m, or as soon thereafter as counsel may be heard and shall be noticed no later than 1 Nov. 1970.

Plaintiff's pleadings, affidavits, and briefs in this matter and the notice for a preliminary injunction shall be submitted to opposing counsel and the court by 1 Nov. 1970. Defendants' opposition counter affidavits and briefs, if any, shall be submitted to opposing counsel and the court by 10 Nov., 1970. Plaintiff's reply briefs, if any, shall be submitted to the court opposing counsel by 15 Nov. 1970.

Plaintiff shall serve this temporary Restraining Order no later than 1 Nov., 1970.

Dated at San Francisco California this 22nd day of Oct., 1970 at .....o'clock.

/s/ ALBERT C. WOLLENBERG
U. S. District Judge

MOTION FOR TEMPORARY RESTRAINING ORDER

In the United States District Court for the Northern District of California

[Title Omitted in Printing.]

CIVIL ACTION NO. C-70 2273
MOTION FOR TEMPORARY
RESTRAINING ORDER

Upon the complaint and other pleadings filed in this case and the affidavit filed in support of this motion, plaintiff Joyce Faye Dones moves this honorable court for an extension of the temporary restraining order granted in this case to Nancy Remillard enjoining defendants, Robert Martin and Robert Jornlin, their successors in office, agents and employees from withholding AFDC benefits from plaintiff on the grounds the service of her husband in the Armed Services does not constitute "continuous absence" from her home to Joyce Faye Dones and her family.

The plaintiff further shows to this honorable court:

(1) In this action plaintiff, Nancy Remillard, has moved for a preliminary injunction to enjoin defendants from denying AFDC benefits on the basis that the absence of a parent from the home due to his service in the Armed Forces does not constitute "continued absence."

(2) Plaintiff Joyce Faye Dones and her children are a needy family within the definition of the California State Department of Social Welfare so as to make her otherwise eligible for AFDC benefits and members of the class represented by Nancy Remillard.

(3) Plaintiff and her children have, according to California Department of Social Welfare Standards, been existing at a below subsistence level since October, 1970.

(4) Plaintiff's affidavit filed in this matter makes it clear that unless benefits are granted immediately she and her family will not be able to purchase the basic necessities of life. There is simply no way to avoid irreparable injury short of granting to her the AFDC benefits to which she is entitled.

Respectfully submitted,

CONTRA COSTA LEGAL
SERVICES FOUNDATION
by: CARMEN L. MASSEY

AFFIDAVIT

In the United States District Court for the Northern District of California

CIVIL ACTION NO. C-702273

[Title omitted in Printing]

AFFIDAVIT
[IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER]

I, Joyce Faye Dones, depose and say:

I am married to Edgar Dones. My residence is 345½ Front Street, Pittsburg, California. We have two children, a boy age three and a girl age four. I am also expecting an additional child to be born the month of January, 1971.

Prior to October, 1970 my husband was present in the home and supporting the family by virtue of his employment at the Fibreboard Corporation in Pittsburg. He earned approximately $600.00 per month. On or about October the 5th of 1970 my husband was notified that he was to be inducted into the United States Army. He left on October the 7th, 1970 and has been stationed at Fort Ord, California since that time.

At the time of my husband's departure, we had no money in the bank nor any significant amount of property which could be readily sold to provide funds for living expenses. As I was pregnant I was and still am unable to seek and obtain employment. I was therefore left with no funds with which to support the children and myself other than the prospect of an allotment to be paid in connection with my husband's military service. The allotment check did not arrive immediately and I knew it would be at least a month before I could expect one. I therefore applied to the

County of Contra Costa for Welfare Assistance on or about the 9th of October. My application was denied because, as it was explained to me, my husband was considered to be fully employed and only temporarily absent from the home. Despite the fact that I had no money at the time and did not know when my first allotment check would arrive, the County refused to grant me any benefits other than an authorization for Food Stamps, which, of course, were useless since I had no money for them.

As a result of this I was unable to pay my semi-monthly rental payment in mid-October. I had no money for groceries and finally appealed to the Red Cross which gave me a $10.00 Food Order around mid-October. On approximately October the 31st, the house we were living in was burned so severely that it was impossible to continue living there. I was then totally without shelter and again had to appeal to the Red Cross. They obtained an apartment for me at a rent of $42.00 per month and paid the first month's rent. Around the beginning of November they also gave me an additional $65.00 for groceries and paid my December's rent since my allotment check had still not arrived. Other than that I had no way to obtain food or shelter for myself and the children and was forced to borrow food and beg meals from my grandmother, since neither my parents nor my husband's parents were able to help me. My first allotment check did not arrive until December 18, 1970 and it was only for $145.00. I have been informed by the Red Cross that I will receive no further retro-active payments from the Army and that $145.00 is the most I can expect per month.

The apartment in which we were residing prior to my husband's induction rented for $120.00 per month. I consider the place in which I am residing to be unfit for myself and my family. The water heater and the heater for the

living quarters are unreliable, the plumbing leaks, the doors do not close properly, and the place is very run down and dirty. However, the $145.00 per month which I expect to continue receiving from the Army is insufficient to allow me to obtain decent living quarters. I have not been and do not expect to be able to provide an adequate diet for my children on the amount I am recieving and my grandmother can no longer assist us with gifts of food. Every cent I have goes for food and rent leaving nothing with which to buy the children needed winter clothing and shoes.

I am being harassed by bill collectors and am in danger of having our car repossessed. If this happens, I will have no way of getting to the doctor and will be without transportation when the time comes for the birth of my baby. On the few dollars the Red Cross has given me and the allotment I am now receiving I have been completely unable to make even interest only payments on the loan contract for the car.

I have been informed by my attorney that the amount I would receive from the County if my application for Welfare Assistance were now approved would be approximately $73.00 per month. This amount plus the $145.00 per month allotment I am now receiving would be sufficient, I believe, to allow me to replace the children's clothes that were burned in the fire, make at least interest only payments on our automobile, and go a long way toward purchasing all of the other items necessary for at least a minimally decent standard of living. If I am unable to get this needed assistance, I believe that my financial inability to purchase needed food and clothing for myself and my children, the threatened loss of our car, my inability to obtain proper shelter and nutrition for myself and my unborn child, and the additional repossession of other personal items for

which we are indebted, will cause me and my family irreparable physical and economic injury.

Dated: Jan. 6, 1971.

/s/ JOYCE FAYE DONES
JOYCE FAYE DONES

[Notarization omitted in printing]

ORDER EXTENDING TEMPORARY RESTRAINING ORDER TO JOYCE FAYE DONES

In the United States District Court for the Northern District of California

Civil No. C-702273

NANCY REMILLARD, et al., *Plaintiff,*

vs.

ROBERT MARTIN, et al., *Defendant.*

ORDER EXTENDING TEMPORARY RESTRAINING ORDER TO JOYCE FAYE DONES

Good cause appearing, it is ordered that the motion for an order extending the Temporary Restraining Order, previously granted in this case, to Joyce Faye Dones, and her two children, members of the class represented by the named plaintiffs, is granted.

It is further ordered that defendants Robert Martin, Director of the State Department of Social Welfare, and Robert Jornlin, Director of the Contra Costa County Social Services Department are hereby restrained from denying Joyce Faye Dones' application for assistance under the Aid for Families with Dependent Children program on the basis that the absence of her husband Edgar Dones, while in service with the Armed Forces of the United States, does not constitute continuous absence sufficient for a finding of parental deprivation as required under said program.

It is further ordered that good cause being shown, this restraining order shall be continued in full force and effect

until the hearing on the motion for a preliminary injunction, filed October 21, 1970, is heard.

Dated: Jan. 20, 1971.

/s/ ALBERT C. WOLLENBERG
Judge, U.S. District Court for
the Northern District of
California

ORDER OF SUBSTITUTION OF PARTY DEFENDANT

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

NANCY REMILLARD, etc., et al., *Plaintiff,*

v.

ROBERT MARTIN, et al., *Defendants.*

ORDER OF SUBSTITUTION OF PARTY DEFENDANT

Whereas Robert Martin has been succeeded in office by Robert B. Carleson as Director of the California State Department of Social Welfare,

It Is Hereby Ordered that Robert B. Carleson, in his official capacity as Director of the California State Department of Social Welfare be, and he is, substituted for Robert Martin as a party defendant in the above-captioned cause and that hereafter, proceedings herein shall be in the name of Robert B. Carleson.

Dated: January 21, 1971.

ALBERT C. WOLLENBERG
Albert C. Wollenberg
United States District Judge

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

[Title omitted in Printing]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Come now the defendants named herein and for an Answer to the Complaint for Declaratory Judgment and Injunction filed herein, admit, deny and allege as follows:

I

Answering paragraph 1 of the complaint, defendants deny that jurisdiction lies under 28 U.S.C. § 1343(3).

II

Answering paragraph 2 of the complaint, defendants admit that this is a proper case for hearing and determination by a three-judge court pursuant to 28 U.S.C. § 2281. Defendants assume that the "AFDC regulation" to which plaintiffs have reference in the allegations of paragraph 2 of the complaint is California State Department of Social Welfare Regulation section 42-350, and based on that assumption, defendants deny plaintiffs' allegation that said regulation is invalid under the Constitution of the United States; defendants allege that said regulation is valid in all respects and further allege that as to this issue, defendants are entitled to a judgment in their favor as a matter of law.

III

Answering paragraph 3 of the complaint, defendants admit that plaintiffs may *seek* a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 but deny each and every other allegation contained in said paragraph 3.

IV

Defendants admit the allegations contained in paragraphs 4, 7, 8, 9, 10, 11, 13, 15, and 16 of the complaint.

V

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, and 12 of the complaint.

VI

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint, except that defendants admit the allegations in the fourth, fifth and seventh sentences of paragraph 14 to the extent that the allegations therein recite specific acts committed by either the Contra Costa County Department of Social Services or the California Department of Social Welfare.

VII

Defendants deny each and every allegation contained in paragraphs 17, 19, 21, and 23 of the complaint.

VIII

Answering paragraphs 18, 20 and 22 of the complaint, defendants incorporate by reference their answers to paragraphs 1-16 inclusive of the complaint.

IX

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint, except that defendants deny that plaintiffs are entitled to receive benefits under the AFDC program.

X

Answering paragraph 26 of the complaint, defendants deny that plaintiffs were entitled to receive AFDC payments for the months from December 1969 through November 1970; defendants allege that pursuant to California State Department of Social Welfare Regulation section 42-350, which regulation is valid and legal in all respects, plaintiffs, and each of them, are, and will continue to be, ineligible to receive AFDC benefits for so long as the father of the plaintiff Remillard child (and the fathers of the member children of the class which the plaintiff Remillard child purports to represent herein) remain on active duty in the armed services of the United States.

XI

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, defendants allege that plaintiffs have failed to state a claim upon which relief can be granted.

XII

SECOND AFFIRMATIVE DEFENSE

As a second affirmative defense, defendants allege that they are entitled to a judgment in their favor as a matter of law.

WHEREFORE, defendants pray that plaintiffs take nothing by reason of their complaint and that the complaint be dismissed.

Dated: February 1, 1971

EVELLE J. YOUNGER,
Attorney General
of the State of California

/s/ JAY S. LINDERMAN,
Jay S. Linderman
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL W. BAKER
Deputy County Counsel

Attorneys for Defendants.

[Statement of Service omitted in printing]

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

[Title omitted in Printing]

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

[Notice of Motion omitted in printing]

Pursuant to Rule 56(b), Federal Rules of Civil Procedure, defendants move the court to enter a summary judgment in defendants' favor dismissing the above-entitled action on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment in their favor as a matter of law.

This motion is based upon the pleadings and papers previously filed herein and upon the notice and memorandum of points and authorities in support of this motion, attached hereto.

Dated: January 21, 1971.

EVELLE J. YOUNGER,
Attorney General
of the State of California

/s/ JAY S. LINDERMAN,
Jay S. Linderman
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL BAKER,
Deputy County Counsel

Attorneys for Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

In the United States District Court for the Northern District of California

No. C-70 2273 ACW

[Title omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

The State of California participates (see Welf. & Inst. Code §§ 11200-488) in the federal government's Aid to Families with Dependent Children ("AFDC") program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). While participation by a state in the AFDC program is voluntary, those states, such as California, which do choose to participate must comply with the requirements of federal law [the Social Security Act and implementing regulations of the U.S. Department of Health, Education and Welfare ("HEW")] in order to be eligible for the receipt of federal funds. *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968).

Under the Social Security Act, provision is made for the granting of assistance to a "dependent child," who is defined in section 406(a) of the Act [42 U.S.C. § 606(a)] as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, and who is living with" any one of certain specified relatives. In addition, 42 U.S.C. § 601 requires participating states to submit a "State Plan" to the Secretary of HEW for

approval, which plans must provide, pursuant to 42 U.S.C. § 602 (a) (10), "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." This case involves the question of the constitutionality of the provision in the HEW-approved California State Plan that provides that an otherwise "needy"[1] child is ineligible to receive AFDC benefits if the parental absence is "in connection with . . . active duty in the Armed Services." California Department of Social Welfare regulation EAS section 42-350.11.[2]

Specifically, plaintiffs contend that the California rule (regulation EAS section 42-350.11) declaring a child, whose father is on active military duty, ineligible to receive AFDC benefits is unconstitutional on three accounts: (1) under the Supremacy Clause because in violation of the Social Security Act and HEW regulations, (2) under the Equal Protection Clause of the Fourteenth Amendment and (3) as a denial of due process and privileges and immunities under the Fourteenth Amendment.

It is respectfully submitted that plaintiffs have misread the federal law and misconstrue the basic purposes of the AFDC program with the results that their Supremacy Clause argument is untenable. Moreover, plaintiffs misapprehend the requirements of the Fourteenth Amend-

1. The determination of whether a child is "needy" is made by the State, which is free to set its own standard. *King v. Smith, supra,* 392 U.S. at 318 & n. 14. In California "need" is determined pursuant to Department of Social Welfare regulations developed pursuant to Welfare and Institutions Code section 11452. It is important to note, however, that this case does not raise any issues concerning California's "need standards." Plaintiffs do not challenge those standards, nor do defendants deny that the plaintiff Remillard child and other similarly situated children of the purported class represented by her, are "needy."

2. A copy of regulation EAS section 42-350 is attached hereto as Exhibit A.

ment. The California regulation comports with the requirements of the Equal Protection, Due Process, and Privileges and Immunities Clauses thereof.

ARGUMENT

I.

NEITHER THE SOCIAL SECURITY ACT NOR HEW REGULATIONS REQUIRE CALIFORNIA TO TREAT A "MILITARY ORPHAN" AS A "DEPENDENT CHILD" ELIGIBLE TO RECEIVE AFDC BENEFITS.

Plaintiffs Supremacy Clause argument appears to be somewhat of a hybrid assertion of two supposedly established principles: first, that under the Social Security Act and HEW regulations, a child of a serviceman away from home on active duty *is* a "dependent child" and that the California regulation, providing exactly to the contrary, is in direct *conflict* with the federal law and therefore is invalid; and second, that the California regulation imposes an eligibility requirement in *addition* to those set by the federal law and is therefore invalid. See Plaintiffs' Brief in Support of Motion for Preliminary Injunction (hereinafter "Pl. Br.") at 4-7.

At the outset, we should make it clear that there is no dispute as to the proposition "that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to these States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *King v. Smith,* 392 U.S. 309, 333 n.34 (1968).

However, plaintiffs seriously overstate the significance of *King v. Smith* when they cite it for the proposition that "the state is not free to impose additional restrictions on

the receipt of AFDC benefits." Pl. Br. at 4:1920. Such a proposition is open to serious question in light of the recent Supreme Court decision in *Wyman v. James,* 39 U.S.L.W. 4085 (January 12, 1971). There the Court upheld the New York practice of terminating AFDC benefits upon the recipient's refusal to permit a home visit by the case worker, even thugh the home visit requirement of the state law was "in addition" to federal requirements. See 39 U.S.L.W. at 4088 & n.6. And see generally, *Comment, "AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,"* 118 U.Pa.L. Rev. 1219 (1970). However, the point really is academic here since the California regulation neither adds to, nor conflicts with, federal law. This is so for the reason that Congress never intended that a "military orphan" (a child who has a parent absent from the home while on active military duty) be included within the definition of a "dependent child" eligible to receive AFDC.

The Supreme Court has noted the origin and limited purpose of the AFDC program:

> "The Social Security Act of 1935 was part of a broad legislative program to counteract the depression. Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves. In agreement with the President's Committeee on Economic Security, the House Committee Report declared, 'the core of any social plan must be the child.' H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *The AFDC program, however, was not designed to aid all needy children.* The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the

children included in relief families present no other problem than that of providing work for the breadwinner of the family. *Ibid.*

* * *

The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father. . . .'* " *King v. Smith*, 392 U.S. 309, 327-8 (1968) (Footnote omitted and emphasis added.)

Thus, public assistance through AFDC "was intended to provide economic security for children," *Id.* at 329, only in the limited family situation where the expectation of relative economic security inuring to a child from his parent was negated by the death, incapacity, or continued absence [42 U.S.C. § 606 (a)] of the breadwinner. Here, the breadwiner in the Remillard family (and in the other families of the purported class represented by the Remillards) is not dead or incapacitated. While he is "absent" from the home, there is no "*continued* absence" within the meaning of the Social Security Act to destroy the expectation of the child deriving "economic security" from him rather than the taxpayers.

Indeed, HEW interprets the "continued absence" requirement for "dependency" and AFDC eligibility in a fashion consistent with the above. HEW's interpretation of the continued absence requirement is set forth in Part IV of the Department's "Handbook of Public Assistance Administration," which, in section 3422.2 thereof provides as follows:

"3422. *Continued Absence of the Parent From the Home*

3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situation as a divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment."

It must be noted that the HEW interpretation is a strict one. The absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "dura-

tion of the absence precludes counting on the parent's performance of his function." HEW gives as an example of the type situation falling within its interpretation, the case where the father deserts the family and disappears. Thus, HEW treats the "continued absence" situation as something akin to death or incapacity, treating all three situations alike, requiring that dependency of a needy child arises only upon a serious and substantial destruction of the expectation of economic protection being available to a child from his parent.

It is unclear whether plaintiffs are contending that HEW interprets "absence on military duty" as *necessarily* constituting "continued absence" giving rise to "dependency" and AFDC eligibility. See Pl. Br., 23. However, if they are asserting that, they are wrong. This is clear since in section 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed forces will be treated as "continued absence."[3] Under section 3422.4 (see Pl. Br. at 3 for text), federal financial

3. The office of the General Counsel of HEW has informed us that the policy in virtually every state is the same as in California; *i.e.*, to *exclude* families of absent servicemen from AFDC eligibility. While the exact number of states with this exclusionary policy is not presently available such data can, and will, be collated and submitted at the Court's request.

We argue in this case that the HEW approach is a correct and sound one and that the California regulation not only has HEW's approval but conforms to federal law. Implicit in this, of course, is the notion that the California exclusionary policy, shared by the vast majority, if not all, of the other states, is, in essence *federal policy*. Theoretically then, the proper defendant in this case is the Secretary of HEW rather than the State of California and Contra Costa County.

We have not moved to join the Secretary of HEW as a necessary party under Rule 19 only for the reason that we believe plaintiffs' arguments to be so untenable that a motion under Rule 19 would be an unwarranted additional burden on the Court. If, however, the Court does not share our opinion of the insubstantiality of plaintiffs' claims, it is submitted that before the Court strikes down the California regulation, HEW should be brought into this litigation, either on our motion or by the Court *sua sponte*, to defend the federal policy embodied in the state's regulation.

participation is available *if* the state includes military-duty absence within its eligibility policy, but HEW requires only that "[w]ithin this interpretation [by HEW] of continued absence the State agency in developing its policy will find it necessary *to give consideration* to such situation as . . . service in the armed forces or other military service. . . ." HEW, Handbook, Part IV, section 3422.2, *supra*.

The California regulation comports with Congressional intent and the requirements of the Social Security Act and is in total harmony with HEW regulations. The California regulation is not invalid under the Supremacy Clause.

II

IN DETERMINING "MILITARY ORPHANS" TO BE INELIGIBLE TO RECEIVE AFDC BENEFITS, CALIFORNIA DOES NOT RUN AFOUL OF THE FOURTEENTH AMENDMENT.

A. Equal Protection.

Plaintiffs correctly state that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." Pl. Br. at 8:3-8. They also correctly assert that unless there is rationality to the classification it must fall in the face of the Equal Protection Clause. This, of course, is axiomatic. *E.g., Dandridge v. Williams*, 397 U.S. 471, 485-6 (1970); *Morey v. Doud*, 354 U.S. 457, 463-4 (1957).

Plaintiffs go on however to make the rather astounding statement that "it is difficult to imagine what basis the state could have for denying assistance to the needy families of absent servicemen when it grants the same assistance

to the needy families of prisoners and deportees." Pl. Br. at 8:16-19. Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other cannot so completely elude plaintiffs. Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security inuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children (but not prisoners' or deportees' children) is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a father. And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father *may* find employment in the country to which he is deported *and* choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing approaching the social ostracism of imprisonment or deportation. In addition, he is employed, and extensive military "allotment" procedures exist as a means to "insure" that part of the serviceman-father's pay ends up in the hands of his wife and children. See generally, U.S. Department of Defense "Military Pay and Allowances Entitlement Manual."[4]

The affidavits of Mrs. Remillard and Mrs. Dones which have been filed herein are poignant indictments of both the

4. A copy of the Department of Defense Manual is available in the office of the Judge Advocate General, Sixth Army Headquarters, Presidio of San Francisco. Copies of the pertinent portions of this manual may, and will, be reproduced and submitted if the Court so desires and requests.

military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility. Plaintiffs' grievances are serious and their complaints are understandable. However, their attacks should more appropriately be on the military establishment rather than on welfare administration.

The problems confronting plaintiffs here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson,* U.S. Dist. Ct., N.D. Cal., No. 50956. Both groups of plaintiffs present the dilemmas of the "working poor" or "*under*-unemployed."[5] In *Macias,* the plaintiffs were challenging the constitutionality of state and federal regulations in the AFDC-U program [the so-called "unemployed father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. See Exhibit B at 6-7. The court approved the Congressional differentiation between the "unemployed and the underemployed" (Ex. B at 14) and upheld the regulations.

We believe a compelling analogy to the *Macias* case may be drawn here. The California regulation here differentiates between the *un*employed, imprisoned father and the *under*-employed serviceman father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions to, underemployment are different from those for unemployment. And "[t]he constitution does not require things which are different in fact or opinion to be treated in low as though

5. We have been unable to find any published version of the decision of January 5, 1970, by the three-judge court in the *Macias* case. Therefore, a copy of the Memorandum of Decision is attached hereto as Exhibit B. The decision of the district court has been affirmed by the United States Supreme Court. *Macias v. Richardson,* 39 U.S.L.W. 3214 (U.S. Nov. 16, 1970).

they were the same." *Tigner v. Texas*, 319 U.S. 141, 147 (1940). The AFDC program is not designed to aid families of *under*employed "breadwinners" (*King v. Smith, supra; Macias v. Richardson, supra*),[6] and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

It is submitted that the California regulation satisfies, with ease, the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). California's classification scheme excludes plaintiffs from AFDC eligibility when they, and probably many others, think that in fairness that they should not be. However, the Equal Protection Clause is not violated simply because a classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Nonetheless, plaintiffs urge that the "traditional" equal protection test is inapplicable here and that rather, the more stringent "compelling state interest" test of *Shapiro v. Thompson*, 394 U.S. 618 (1969) must be applied. We submit that plaintiffs' efforts in this regard are so tortured that they must be rejected.

As the first step in plaintiffs' bootstrap argument, they set up a "straw man" by suggesting that one of the reasons

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6. Certainly Congress could have included the underemployed within the purview of AFDC. Its failure to do so, however, does not invalidate the entire statutory scheme. Congress, as any legislative body, "may take one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). And see, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1084-87 (1969).

for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." Pl. Br. at 8:19-20.[7] They then argue that such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. They suggest that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" in *Shapiro v. Thompson, supra.*

While it is clear that one may look to the Constitution and find a *duty* or "obligation of the citizen to render military service," *The Selective Service Draft Law Cases,* 245 U.S., 366, 375 (1918), one can look only to plaintiffs' imagination, and not to the Constitution or its penumbra, to find a *right* to military service.

However, even if there be a constitutionally protected right to serve in the Armed Forces, that right is not being infringed by the California regulation. Unlike *Shapiro,* where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve his country that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus, a "compelling" state interest need not be shown. *Cf. McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 806-808 (1969). *Dandridge v. Williams,* 397 U.S. 471 (1970) involved classifications affecting "the most basic economic needs of impoverished human beings." *Id.* at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

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7. It must be noted that it is *plaintiffs'* suggestion that the rationale behind the serviceman exclusion is to discourage military duty. In no way does the State of California attempt or suggest that such a rationale does, or constitutionally could, underlie the exclusion.

B. Due Process.

Plaintiffs assert that the California regulation "is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." Pl. Br. at 12:27-31. Without wishing to appear as semantic gymnasts, we submit that what is wrong with plaintiffs' assertion is that they have neglected to put quotation marks around the two words "continuously absent." Had they done so, "continuous absence" would correctly be denoted as the "words of art" that they are, deriving meaning only within the context in which they are used in the Social Security Act. See 42 U.S.C. § 606(a). In so doing, the "presumption" of non-eligibility of children of servicemen is neither arbitrary and capricious nor irrational. Rather, it is in conformity with the Congressional purposes underlying the AFDC program. *King v. Smith,* 392 U.S. 309 (1968). Plaintiffs, and others, may think the exclusion of servicemen's children from AFDC eligibility to be a manifestation of unsound social policy but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955). As the Supreme Court stated last term in *Dandrige v. Williams, supra,* 397 U.S. at 484-5, "That era long ago passed into history. *Ferguson v. Skrupa,* 372 U.S. 726."

CONCLUSION

California Department of Social Welfare regulation EAS section 42-350 is constitutional. Defendants are entitled, therefore to a judgment in their favor as a matter of law. Date: February 5, 1971.

Respectfully submitted,

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[Exhibits and Statement of Service omitted in printing]

MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS

In the United States District Court for the Northern District of California

[Title omitted in printing]

No. C-70 2273 ACW

MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS

[Notice of Motion omitted in printing]

Plaintiffs, by their attorneys, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court to enter summary judgment for the plaintiffs on the ground that there is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law.

Further, plaintiffs, by their attorneys, oppose the Motion for Summary Judgment for Defendants which has been made by defendants.

This motion and this opposition are based upon the pleadings and papers previously filed herein and upon the Notice and Brief in support of this motion and opposition attached hereto.

Dated: February 11, 1971.

CONTRA COSTA LEGAL SERVICES FOUNDATION
by: /s/ CARMEN L. MASSEY
Carmen L. Massey
Attorney for Plaintiffs

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS

In the United States District Court for the Northern District of California

[Title omitted in printing]

No. C-70 2273 ACW

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS

ISSUE PRESENTED

The following facts are not in dispute in this case:

(1) In order to be eligible for AFDC benefits a child must be both *needy* and *dependent*. (42 U.S.C. 601-609).

(2) Plaintiffs and members of their class are needy individuals as defined by the California Department of Social Welfare Standards of need. (Defendant's Brief: Footnote No. 1).

(3) Plaintiffs and members of their class are currently living separate from their husbands and fathers due to their service in the United States Armed Forces (Affidavits of Nancy Remillard and Joyce Faye Dones; no counter-affidavits filed; Defendant's Answer, paragraph V).

(4) 42 U.S.C. 606 includes within the term "dependent child" one who has been deprived of parental support or care by reason of the "continued absence from the home" of a parent.

(5) Federal participation is available for AFDC grants to Plaintiffs and members of their class. (Defendant's Brief: page 8, lines 1-3).

(6) Plaintiffs and members of their class have been denied and are being denied AFDC benefits solely on the basis of California SDSW Manual-EAS § 42-350.11, which states there is no "continuous absence" where the absence of the parent is due to active duty in the Armed Services. (Defendant's Answer: Paragraph V).

(7) Federal law is controlling in this matter. (Defendant's Brief: Page 1, lines 22-28).

The sole issue to be decided on Plaintiffs' and Defendants' motions for summary judgment is whether § 42-350.11, in light of federal law and the equal protection, due process, and privileges and immunities clauses of the Fourteenth Amendment of the United States Constitution, is invalid and its operation should be enjoined by this Court.

I.

THE SOCIAL SECURITY ACT FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

> One of the statutory requirements is that "aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . ." [42 U.S.C. 602(a)(10)] . . . [42 U.S.C. 606(a)] defines a "dependent child" as one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent." In combination, these two provisions of the Act clearly require participating States to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible. (*King v. Smith*, 392 U.S. 309, 317)

The import of *King v. Smith* is that the federal Act determines the class of individuals to whom the states must grant eligibility; state provisions that have the effect of

narrowing that class, thereby denying eligibility to some whom Congress intended to cover, are to that extent invalid because violative of the requirement of 42 U.S.C. 602(a)(10) that AFDC be provided "to all eligible individuals."

This import has been reflected in several district court opinions. Thus *Doe v. Shapiro,* 302 F. Supp. 761, appeal dismissed 396 U.S. 488 (1970), struck down a state regulation providing for the termination of AFDC to illegitimate children whose mothers refused to disclose the name of their father, holding that "the challenged regulation is invalid on the ground that it imposes an additional condition of eligibility not required by the Social Security Act." 302 F. Supp. 764.

In *Cooper v. Laupheimer,* Civ. No. 69-2421 (E.D. Pa. April 16, 1970) a state regulation provided for recovery of an overpayment by means of a reduction in subsequent grant payments. The Court held that the federal duty imposed by 42 U.S.C. 602(a)(10) is breached if an "otherwise eligible child is deprived of AFDC funds because of parental misconduct." Memorandum Opinion at 13; the regulation was invalid because it was inconsistent with that federal requirement. *id* at 20.

In *Damico v. California,* No. 46538, (N.D. Calif. Sept. 12, 1969) this Court held that California Welfare regulations which stated there was no "continued absence" due to separation unless the applicant had either filed a legal action or the separation had lasted three months were in conflict with 42 U.S.C. 606(a) defining "dependent child" and the primary purposes of the AFDC Program. *Doe v. Hursh,* Civ. No. 4-69-403 (D. Minn. June 30, 1970) is in accord with this decision.

In short, *King v. Smith,* supra, not only prohibits states from withholding AFDC to deter illegitimacy or control sexual conduct, but also precludes all eligibility require-

ments unrelated to need, except those explicitly sanctioned by the statute or its legislative history. *Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith"* 118 U. Pa. L. Rev. 1219 (1970).

Wyman v. James, 91 S. Ct. 381 (1971) does not, as suggested by Defendant, diminish this reading of *King v. Smith. Wyman v. James* discusses only the constitutionality of social worker visits in light of the Fourth and Fourteenth Amendments and concludes that such visits are a reasonable administrative tool for the dispensation of the AFDC program which is designed to provide a "personal, rehabilitative orientation" (*id* at 387) and which has a positive duty to refer to courts or law enforcement agencies any unsuitable home in which an AFDC child is present (*id* at 385), and that such visits do not violate the Fourth and Fourteenth Amendments. *Wyman* does not deal with the denial of benefits to a class of needy and federally eligible children who are denied benefits solely because of the status of their parents, as was the case in *King v. Smith, Damico v. California, Doe v. Hursh* and this case.

Defendant first contends that "Congress never intended that a 'military orphan' be included within the definition of a 'dependent child' eligible to receive AFDC" (Def. Br., page 4, lines 14-17) and then asserts that "HEW specifically defers to the states to determine whether as a matter of *state* policy service in the armed services will be treated as 'continued absence' (Def. Br., page 7, lines 26-page 8, line 1) and agrees that "federal financial participation is available if the state includes military duty absence within its eligibility policy." (Def. Br., page 8, lines 2-3). Certainly, HEW could not legally defer to the states the choice as to whether to include a certain class of needy children in the Aid to Families with Dependent Children program if Congress had not intended that such children should be

covered. If "military orphans" were not "dependent children" within the meaning of the Social Security Act, HEW would have no authority to provide federal funds for the repayment of AFDC benefits to such children.[1]

It is respectfully submitted that Defendant has misread Section 3422.2 of Part IV of HEW's "Handbook of Public Assistance Administration." (set out in Plaintiff's Brief in Support of Motion for Preliminary Injunction: page 2, line 32-page 3, line 20; and Defendant's Brief: page 6, line 7-page 7, line 10). Defendant asserts (Def. Br., page 7, line 25-page 8, line 8) that, by § 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed services will be treated as "continued absence." Plaintiffs contend that a correct reading of § 3422.2 is that state agencies *must* consider these

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1. In contrast to Note No. 3 of Defendant's Brief, Plaintiff has secured a copy of a State Survey submitted by Plaintiffs in *Stoddard v. Fisher*, Civil No. 11-168 (S.D.Maine) which indicates:

(1) twenty-two states give aid to all servicemen's families (Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia);

(2) twenty-one states give no aid to the families of servicemen (Alabama, Arkansas, California, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Puerto Rico, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, Wyoming);

(3) two states limit aid to families of draftees (Idaho, Maine);

(4) two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft (Iowa, Vermont);

(5) five states did not participate in the survey (Kentucky, Nevada, Tennessee, Utah, Washington). Of these last five states, the Bureau of Social Science Research in Washington, D.C. has submitted to Plaintiff information that Kentucky, Utah and Washington do grant AFDC to Military families. This brings the total number of states that do grant AFDC benefits to military families to twenty-five.

circumstances as constituting "continued absence" where the parents are, in fact, living separately. It should be noted that the wording of the regulation is mandatory; "the State agency in developing its policy *will find it necessary* to give consideration to such situations as . . . service in the armed services or other military service . . ." If the correct interpretation of this regulation were as Defendant urges, surely the wording would be: "the State agency *may* consider . . ."

It is doubtful that Defendant would argue that the States are free to define "continued absence" so as to preclude families separated by divorce, desertion, hospitalization or imprisonment from AFDC benefits. Yet, these situations are put into the same classification as military service in § 3422.2. It is submitted that § 3422.2 does not free the states to make their own interpretation as to what constitutes "continued absence." See *King v. Smith,* supra; *Damico v. California,* supra.

As Defendant states, (Def. Br., page 5, lines 10-18) the AFDC program was designed to protect that group of children in families without a "breadwinner," "wage earner" or "father." The affidavit of Joyce Faye Dones reveals a family which, prior to October, 1970, did have a "breadwinner." When the federal government ordered Mr. Dones to report for induction, it deprived the Dones family of his earning power and destroyed the economic security of the Dones family. It is ironic that, if Mr. Dones had refused to be inducted and consequently been imprisoned for this criminal act, there is no doubt but that the Dones family would be entitled to AFDC benefits. To punish compliance with the law surely cannot be a permissible goal of the California Welfare Department.

If Plaintiff were to file for a dissolution of her marriage or a legal separation from her husband, her practical cir-

cumstances would not change. She would still receive her allotment and she would still be living separately from her husband. However, she would, with the filing of the legal papers, become eligible for AFDC benefits. That it is violative of the Social Security Act and its purpose of keeping families intact to force such actions on mothers trying to obtain the minimum needs for their children is clear. *Damico v. California,* supra.

In summary, 42 U.S.C. 602(a)(10) requires that all needy dependent children must be granted AFDC benefits if they so apply. The State is not free to eliminate from its AFDC rolls needy children who are federally eligible for AFDC benefits unless specifically authorized to do so by the Social Security Act. (*King v. Smith,* supra.) Children who have a parent continuously absent from the home because of military service are dependent children within the meaning of 42 U.S.C. 606(a). California has violated the Social Security Act by its denial of AFDC benefits to Plaintiffs and members of their class solely on the basis that the absence from the home of a parent due to military service is not "continuous absence" so as to make the family eligible for AFDC benefits.

II.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

Plaintiffs have already stated in their Brief in Support of Motion for Preliminary Injunction their arguments that 42-350.11 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution:

(1) As there is no rational basis to support the classification of 42-350.11, it must fall as a violation of the equal protection clause;

(2) As the right to serve in the Armed Forces is a fundamental right of United States citizenship, a classification which denies AFDC benefits to families where the absence of a parent is due to his military service, while it grants AFDC benefits to families where the absence of a parent is for other reasons, is unconstitutional unless the state can show a *compelling* interest. *Shapiro v. Thompson,* 394 U.S. 618 (1969).

The case of *Macias v. Finch,* No. 50956 (N.D. Calif), as cited by Defendant, is not relevant to this argument. That case dealt with *intact* families in which the wage earner, although fully employed by state and federal standards, was earning an amount insufficient to meet his family's needs. The *Macias* case dealt with AFDC coverage under 42 U.S.C. 607; it carefully distinguished cases such as this one where Plaintiffs are eligible for AFDC benefits under 42 U.S.C. 606.

Defendant states that, in the case of military families, the husband and father is "employed" and there are legal means to insure that part of his pay ends up in the hands of the family. (Def. Br., page 10, lines 4-8) That is immaterial, as Defendant has already agreed that Plaintiffs are needy, and that their allotments, if any, are insufficient to cover the needs of the family as defined by the California Department of Social Welfare. This case is better compared with the situation where the parents are living separately, either by mutual consent or court order, and the father is working and paying child and spousal support to the family. If the support payments do not meet the standards of need established by the Welfare Department, there is no question but that the family will receive AFDC benefits. In

that situation there are likewise legal means to see that the family receives *some* financial help, but the needy child is not refused AFDC because of this partial support or because of an expectation of support.

Because military service is a right guaranteed to United States citizens, the state may not interfere with that right except for a compelling state reason. Even if military service were not such a right, there is no rational reason to deny AFDC benefits to families where deprivation of a child is due to a parent's absence from the home due to military service, when such benefits are granted to families where deprivation of a child is due to a parent's absence because of divorce, desertion, separation, hospitilization, incarceration or deportation.

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

Any law that clearly impinges upon a fundamental right must be shown to reflect a *compelling* governmental interest or it must fall under the due process clause of the fourteenth amendment. *Shapiro v. Thompson,* supra.

The United States Supreme Court has held the above statement of law applies to such diverse rights as: the right to travel [*Shapiro v. Thompson,* supra; *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659 (1964)]; right to marry [*Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817 (1967)]; right to privacy (*Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678); right to educate one's children as one chooses (*Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571); right to study the German language in a

private school (*Meyer v. Nebraska,* 262 U.S. 390, 43 S. Ct. 625); right to freely associate with other persons (*NAACP v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163).

It is submitted, for the reasons put forth in Plaintiffs Brief in Support of Motion for Preliminary Injunction, that the right to military service is also such a fundamental right and that it cannot be infringed upon by the state in the absence of a compelling reason.

It is further submitted that, where a father is, in fact, continually absent from the home, a state regulation that he is not absent because his absence is due to military service is so arbitrary, capricious and irrational as to fall before the due process clause of the Fourteenth Amendment. The words "continuous absence" as found in the Social Security Act have a very clear meaning. It is the state regulation which has turned them into "words of art" so as to deprive Plaintiffs and the members of their class of the AFDC benefits which are rightfully theirs.

CONCLUSION.

California Department of Social Welfare regulation EAS §42-350 is invalid as violative of the federal Social Security Act and unconstitutional as violative of the equal protection, due process and privileges and immunities clauses of the Fourteenth Amendment of the United States Constitution. Plaintiffs are entitled to a judgment in their favor as a matter of law.

Date: February 11, 1971

Respectfully submitted,

/s/ CARMEN L. MASSEY
CONTRA COSTA LEGAL SERVICES FOUNDATION
Carmen L. Massey
Attorney for Plaintiffs

AFFIDAVIT OF DONALD F. FONTAINE

Now comes the affiant, being duly sworn, who deposes as follows:

1. During the summer of 1970, a law student employed by Pine Tree Legal Assistance, of which I am the Chief Attorney, undertook a survey of the number of states who provide A.F.D.C. benefits to families of servicemen. That student, whose name is Clifford Goodall, worked under the supervision of Robert Mittel, Esq., and myself;

2. During the months of July August and September of 1970, he sent copies of a questionnaire to attorneys in all 50 states and Puerto Rico and the District of Columbia seeking information about the practices of the Health & Welfare Department in those states with respect to eligibility of families of servicemen for A.F.D.C. benefits; a copy of that questionnaire is attached hereto and made a part hereof;

3. The results of that survey, with changes made because of additional information received since the date of that survey, are as follows:

a. 22 states and the District of Columbia give aid to all servicemen's families—

Arizona
Alaska
Colorado
Connecticut
Delaware
District of Columbia
Hawaii
Illinois
Indiana
Kansas
Massachusetts
Montana
Nebraska
New Jersey
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
Virginia

b. 19 states and Puerto Rico give no aid to the families of servicemen—

Alabama
Arkansas
California
Florida
Georgia
Louisiana
Maryland
Michigan
Minnesota
Mississippi
Missouri
New Hampshire
New Mexico
Puerto Rico
South Carolina
South Dakota
Texas
West Virginia
Wisconsin
Wyoming

c. Two states limit aid to the families of draftees—Idaho and Maine.

d. Two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft—

Iowa and Vermont

e. 5 states ~~gave~~ no response to the survey—

Kentucky
Nevada
Tennessee
Utah
Washington

DONALD F. FONTAINE, Esq.
Chief Attorney

Subscribed and sworn to before me this 18th day of February, A.D. 1971.

JUNE BOURGOIN
Justice of the Peace

[Attachments to Affidavit and Statement of Service omitted in printing]

OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

United States District Court
Northern District of California

No. C-70 2273 ACW

[Title omitted in printing]

OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

On or about February 11, 1971, plaintiffs filed their notice of motion and (cross-)motion for summary judgment herein. In their brief in support of the motion,[1] plaintiffs assert three major arguments in support of their position that they are entitled to a judgment as a matter of law that California Department of Social Welfare regulation EAS section 42-350.11 is unconstitutional. Those arguments, summarized as we understand them are as follows:

1. Under the Social Security Act and HEW implementing regulations, the child of an active duty serviceman *is* eligible to receive AFDC benefits and the California regulation is invalid because it narrows that federal eligibility standard.

2. The California regulation is invalid under the Equal Protection Clause because "there is no rational reason" (Pl.S/J Br. at 9:2) for the classification which excludes servicemen's children from AFDC eligibility.

3. The California regulation denies plaintiffs due process of law because it infringes on "their" alleged "right

1. To differentiate it from the original brief filed by plaintiffs, we will refer to plaintiffs' summary judgment brief by means of the citation "Pl. S/J Br.".

to military service" (*Id.* at 9:30) without any compelling governmental interest to justify that alleged infringement.

We submit that there is no merit to any of plaintiffs' arguments.

ARGUMENT

I

THE SOCIAL SECURITY ACT DOES NOT REQUIRE THAT "MILITARY ORPHANS" BE GRANTED AFDC BENEFITS AND HEW DEFERS TO STATE POLICY CONCERNING AFDC ELIGIBILITY OF SUCH CHILDREN.

Plaintiffs cite (Pl.S/J Br. at 2-3) *King v. Smith*, 392 U.S. 309, 317 (1968), for the proposition that the Social Security Act establishes federal eligibility requirements and that the states must grant aid to all families who may be eligible under the federal law. We argued in the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment (at 4-5) that Congress did not intend to include a child of an absent serviceman within the AFDC program. However, even if "military orphans" *may be* considered as eligible under the Social Security Act, such children do not *have to be* considered eligible by the states. This is the unequivocal conclusion of HEW with respect to defining "continued absence" [42 U.S.C. § 606(a)] of, *e.g.*, a serviceman (HEW, "Handbook of Public Assistance Administration," Part IV, section 3422.2) and in all other instances of eligibility determinations. The view of HEW is that the Social Security Act sets the outer limits of eligibility for which federal contributions are available, but a state is free to draw more constricted parameters around its AFDC program than would be allowable in terms of the availability of federal matching funds. The states, in HEW's

view, are limited in this regard only by what is popularly known as "Condition X"—or the "equitable treatment doctrine." See generally, *Comment, "AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,"* 118 U.Pa.L. Rev. 1219, 1221-25 (1970).

An excellent presentation by HEW of its views in this regard was made in a brief filed in the case of *Barksdale v. Shea,* U.S.D.C., D. Colo., Civil Action No. C-1967. We have reproduced a copy of that brief and it is attached hereto as Exhibit A. In that case, welfare recipients alleged that the Colorado law which imposes a "more restrictive" age requirement for AFDC eligibility than does the Social Security Act is invalid under 42 U.S.C. § 602(a)(10). That section requires "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." And, of course, it is the section on which plaintiffs here rely as a basis for their contention that the California regulation in question is invalid because allegedly "more restrictive" than the Social Security Act.

Our information is that no decision has yet been rendered in that Colorado case. However, the HEW position of deferring to the state's determination of eligibility has been upheld in a similar case in Illinois. *Alexander v. Swank,* ..... F. Supp. ....., (April 30, 1970), CCH, Pov. L. Rep. ¶ 11426, *prob. juris. noted,* 39 U.S.L.W. ..... (U.S. February 22, 1971). And see, *McClellan v. Shapiro,* 315 F.Supp. 484 (D. Conn. 1970).

Moreover, despite plaintiffs' attempted distinguishing (Pl.S/J Br. at 4:4-18) of *Wyman v. James,* ..... U.S. ....., 91 S.Ct. 381 (1971), we submit that necessarily implicit in that decision is the determination by the Supreme Court that the states are free to impose reasonable eligibility restrictions that are "in addition" to federal eligibility criteria. In *Wyman,* the plaintiff class of AFDC children

were receiving AFDC benefits and presumably were in all respects "needy" and "dependent" children—at least as far as federal eligibility criteria were concerned. However, New York State imposed a "home visit" requirement as a condition of continued receipt of AFDC benefits. There is no such requirement in the federal law. See 91 S.Ct. at 387 & n.6. The Supreme Court nonetheless upheld the New York statute. Thus, the practical effect of the decision is that children in New York who are eligible, from the viewpoint of the federal government, may be denied AFDC benefits because their mothers choose not to allow a home visit by the caseworker as required by New York. By a parity of reasoning, California may exclude servicemen's children from AFDC eligibility even though, from the federal viewpoint, it might be equally permissible for California not to exclude them. In other words, as long as the State determination is reasonable—which surely the California regulation in question is—that classification need not be co-extensive with federal eligibility standards.

II

THE CALIFORNIA REGULATION COMPLIES WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

Plaintiffs reiterate their allegation that the California regulation violates the Equal Protection Clause. Pl.S/J Br. at 7-8. However, we do not believe that they have adduced anything new that lends any merit to their insubstantial claim. One point of plaintiffs warrants comment however. They argue as follows:

> "Defendant states that, in the case of military families, the husband and father is 'employed' and there are legal means to insure that part of his pay ends up in the hands of the family. (Def.Br., page 10,

lines 4-18) That is immaterial, as Defendant has already agreed that Plaintiffs are needy, and that their allotments, if any, are insufficient to cover the needs of the family as defined by the California Department of Social Welfare." Pl.S/J Br. at 8:12-18.

This statement appears to evidence a notion on plaintiffs' part that simply because they are needy, they must be paid AFDC. Of course, that is a terribly mistaken notion, since one must be both needy *and* dependent. Plaintiffs satisfy the need criterion but they are not "dependent." California determines that a serviceman is not an absent parent, or to put it conversely, the serviceman father is deemed to be "present." Thus, even though the father's support may be insufficient to meet the family needs, his "presence" renders the child ineligible for assistance. *Cf. King v. Smith,* 392 U.S. 309, 329 (1968).

Plaintiffs "new" due process argument consists of a citation of seven Supreme Court cases (Pl.S/J Br. at 9:17-27) in support of the proposition that a law is invalid if it impinges on any of a variety of fundamental rights. We have no dispute with plaintiffs over these cases other than that citation of them is totally inapposite to the case at hand. This is so for the simple reason that there is no fundamental constitutional right at issue in this case. No such sanctity attaches to either the "right to welfare" or the "right to military service" even assuming that there is a right, of any kind, to either. Moreover, there are no rights which are illegally infringed by operation of California Department of Social Welfare regulation EAS section 42-350.11.

Dated: February 25, 1971.

EVELLE J. YOUNGER, Attorney General of the State of California

/s/ JAY S. LINDERMAN,
Jay S. Linderman
Deputy Attorney General

JOHN B. CLAUSEN, Contra Costa County Counsel

PAUL W. BAKER, Deputy County Counsel

Attorneys for Defendants.

[Exhibit and Statement of Service omitted in printing]

ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DISSENTING OPINION OF JUDGE CONTI ATTACHED

In the United States District Court for the Northern District of California

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al. *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al. *Defendants.*

ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DISSENTING OPINION OF JUDGE CONTI ATTACHED

[The majority and dissenting Opinions Below are printed in the Appendix to the Jurisdictional Statement at pages A1 and A7, respectively]

STAY OF EXECUTION OF ORDER GRANTING INJUNCTIVE RELIEF

In the United States District Court for the Northern District of California

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al.
Plaintiffs,

vs.

ROBERT B. CARLESON, et al.
Defendants.

STAY OF EXECUTION OF ORDER GRANTING INJUNCTIVE RELIEF.

[A copy of the District Court stay-Order is printed in the Appendix to the Jurisdictional Statement at page A18. That Order was vacated by Mr. Justice Douglas by Order dated August 3, 1971. Appellants' Motion to Reinstate Stay was denied by the Supreme Court of the United States by Order dated October 12, 1971.]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In the United States District Court for the Northern District of California

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al.
Plaintiffs,

vs.

ROBERT B. CARLESON, etc., et al.
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[The Notice of Appeal to the Supreme Court of the United States is printed in the Appendix to the Jurisdictional Statement at page A20.]

In the Supreme Court of the United States

OCTOBER TERM, 1970

70-250

No. ~~1794~~

ROBERT B. CARLESON, et al.,
Appellants,

vs.

NANCY REMILLARD, et al.,
Appellees.

On Appeal From the United States District Court
for the Northern District of California

Jurisdictional Statement

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

ROBERT B. CARLESON, et al.,
Appellants,

vs.

NANCY REMILLARD, et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of California

Jurisdictional Statement

Appellants Robert B. Carleson, Director of the California Department of Social Welfare; and Robert Jornlin, Director, Lois Lee, Social Worker, Susan Giordano, Social Worker, Helen Kornguth, Eligibility Worker, John Gibson, Social Worker Supervisor, all of the Contra Costa County (California) Department of Social Services, appeal from the Order Granting Declaratory Judgment and Injunctive Relief issued on March 31, 1971, by the specially constituted three-judge United States District Court for the Northern District of California. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The Opinion and Order of the United States District Court are not reported. Copies of the majority and dissenting opinions are attached hereto as Appendix A. A copy of the Order Granting Stay of Execution of Order Granting Injunctive Relief is attached hereto as Appendix B.

JURISDICTION

This suit was brought in the United States District Court for the Northern District of California by appellees on behalf of themselves and all others similarly situated for declaratory and injunctive relief pursuant to Title 28, United States Code sections 2201 and 2202 and Title 42, United States Code section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code section 1343(3). Appellees sought a declaration that California Department of Social Welfare Regulation EAS section 42-350.11 is in violation of the Social Security Act (42 U.S.C. §§ 601-609) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Since appellees sought an injunction against the enforcement of Regulation EAS section 42-350.11, a regulation of statewide applicability, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code sections 2281 and 2284.

The District Court Order Granting Declaratory Judgment and Injunctive Relief was entered on March 31, 1971 and appellants' Notice of Appeal to this Court was filed in the United States District Court for the Northern California on April 7, 1971. A copy of the Notice of Appeal is attached hereto as Appendix C.

The jurisdiction of the Supreme Court of the United States on this direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b).

STATUTES INVOLVED

The statutes and regulations involved are Title 42, United States Code sections 601, 602(a)(10), and 606(a); United States Department of Health, Education and Welfare, "Handbook of Public Assistance Administration," Part IV, section 3422; and California Department of Social Welfare Regulation EAS section 42-350. The text of these statutes and regulations is set forth in Appendix D attached hereto.

QUESTION PRESENTED

Must the Social Security Act and/or the Due Process and Equal Protection Clauses of the Fourteenth Amendment be interpreted as requiring California to grant welfare benefits, under the Aid to Families with Dependent Children program (42 U.S.C. §§ 601-610), to families in which the father is absent from the home in the military service, notwithstanding the longstanding administrative interpretation of the Social Security Act by the United States Department of Health, Education and Welfare that the Act does not require a state to grant aid to such families?

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year-old child. Gregory Remillard, the husband of Nancy and father of Karen Marie Remillard, is on active duty in the United States Army, having enlisted therein in May, 1969 and having reenlisted in March 1970 for a five-year term.

In September 1970, appellee Nancy Remillard applied to the Contra Costa County (California) Department of Social Services for assistance for her and her daughter under the Aid to Families with Dependent Children ("AFDC") program (42 U.S.C. §§ 601-10; Cal. Welf. & Inst. Code §§ 11200-488).

Mrs. Remillard's AFDC application was denied on the ground that Mr. Remillard's absence from the home was not a "continued absence" within the meaning of section 406(a) of the Social Security Act [42 U.S.C. § 606(a)]. The actual legal basis for the denial by Contra Costa County was California Department of Social Welfare Regulation EAS § 42-350.11 (see Appendix D, p. A23, *infra*) a regulation of statewide applicability, binding on all California counties (see Cal. Welf. & Inst. Code §§ 10553, 10554, 10600, 10604).

This action was commenced on October 21, 1970, wherein appellees, Mrs. Remillard and her daughter, on behalf of themselves and all others similiarly situated, sought a declaration of the invalidity, and an injunction restraining the enforcement, of EAS § 42-350.11 on the grounds that it was in conflict with the Social Security Act and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

Appellants filed an Answer to the complaint and moved for summary judgment in their favor. Appellees filed a cross-motion for summary judgment. A three-judge court was convened pursuant to Title 28, United States Code sections 2281 and 2284, and heard the cross-motions for summary judgment on February 25, 1971. It was stipulated that the matter could be submitted for a final decision.

On March 31, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Order Granting Declaratory Judgment and Injunctive Relief (Appendix A). It is from this Order which appellants appeal. The District Court unanimously granted appellants' Motion to Stay Injunction Pending Appeal and on April 13, 1971, execution of the injunction order of March 31, 1971, was ordered stayed. (Appendix B.)

THE QUESTIONS ARE SUBSTANTIAL

The State of California participates (see Cal. Welf. & Inst. Code §§ 11200-488) in the Federal government's Aid to Families With Dependent Children ("AFDC") program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). While participation by a State in the AFDC program is voluntary, those states, such as California, which do choose to participate must comply with the requirements of federal law [the Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare ("HEW")] in order to be eligible for the receipt of federal funds. *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968).

Under section 401 of the Social Security Act (42 U.S.C. § 601), provision is made for the granting of assistance to a 'dependent child," who is defined in section 406(a) of the Act as a "needy child . . . who has been deprived of parental support or care by reason of the death, *continued absence from the home,* or physical or mental incapacity of a parent, and who is living with" [42 U.S.C. § 606(a) (Emphasis added)] any one of certain specified relatives.

Additionally, sections 401, 402, 403, and 404 of the Social Security Act (42 U.S.C. §§ 601, 602, 603, 604) require participating states to submit a "State Plan" to the Secretary of HEW for approval, which plans must provide, pursuant to 42 U.S.C. section 602(a)(10), "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

This appeal involves the question of the constitutionality of the provision in the HEW-approved California State

Plan that provides that an otherwise "needy"[1] child is ineligible to receive AFDC benefits if the parental "absence from the home" [42 U.S.C. § 606(a)] is "in connection with . . . active duty in the Armed Services." California Department of Social Welfare Regulation EAS § 42-350.11 (Appendix D, p. A23, *infra*).

The District Court has found the California regulation (EAS § 42-350.11, Appendix D) to be invalid. The court purported not to decide the constitutional issues presented,[2] but noted that "it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." District Court Opinion, Appendix A, p. A5, *infra*. Thus, the District Court states that it is basing its decision on an interpretation of the Social Security Act which it believes is necessary to avoid reaching supposedly substantial substantive constitutional problems. The error in the District Court's reasoning arises out of the fact that the California regulation comports with the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Thus there is no necessity or basis for invali-

---

1. The determination of whether a child is "needy" is made by the State, which is free to set its own standards. *King v. Smith*, 392 U.S. 309, 318 & n.14. In California, "need" is determined according to State Department of Social Welfare regulations developed pursuant to California Welfare and Institutions Code section 11452. It must be noted, however, that this appeal does not raise any issues concerning California's "need standards." Appellees have not challenged those standards, nor have appellants denied that appellees are "needy."

2. In their Complaint, appellees urged that the California regulation denied them equal protection and due process and they urged a pendant claim that the regulation was invalid under the Supremacy Clause because in conflict with the Social Security Act. The case was extensively briefed and argued on both the constitutional and nonconstitutional issues.

dating the state regulation under the Supremacy Clause to avoid reaching constitutional problems that do not exist. Moreover, the California regulation is valid under the Supremacy Clause; it is in conformity with the Social Security Act and the regulations of HEW.

I. Neither the Social Security Act Nor Hew Regulations Require California to Treat a "Military Orphan" as a "Dependent Child" Eligible to Receive AFDC Benefits.

The Social Security Act requires that aid "be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10). Here, the question is whether a child, whose father is away from home on military duty, is an "eligible" child, that is, one who suffers "dependency" which is attributable to the "continued absence" [42 U.S.C. § 606(a) (Appendix D, p. A21, *infra*)] of a father who is away from home on military assignment.

That the father is absent in this situation is clear. However, it is equally clear that there is no "continued absence" within the meaning of the Social Security Act. This is so for reason that "continued absence", as it is used in the Act, connotes a type and degree of social and economic estrangement between parent and child which is not attributable to the situation posed by military service.

This Court previously has had occasion to note that in enacting the Social Security Act, "Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves," *King v. Smith,* 392 U.S. 309, 327 (1968), but that "[t]he AFDC program, however, was not designed to aid all needy children." *Id.* at 328. Rather, "[i]t was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.' H. R. Rep. No. 615, 74th Cong., 1st Sess., 10

(1935). This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father . . . .' " *Id.*

Thus, public assistance through AFDC "was intended to provide economic security for children," *Id.* at 329, only in the limited family-situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similiar type of substantial intra-familial dissociation, denominated by Congress as a "continued absence." Here, there has been no death or incapacitation of the breadwinner nor a severance of the ties between parent and child of the type to give rise to "dependency" and AFDC eligibility.

HEW's interpretation of the "continued absence" requirement is set forth in section 3422 of Part IV of the Department's "Handbook of Public Assistance Administration" (hereinafter referred to as "Handbook") (see Appendix D; p. A22, *infra*, for text of § 3422). The interpretation is a strict one: the absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." *Id.* As an example of the type of situation falling within its interpretation, HEW cites the case where the father deserts the family and disappears.

The District Court has correctly analyzed the HEW regulation in noting that "[t]he precise definition of 'continued absence' rests with the States," (District Court Opinion, Appendix A, p. A3, *infra*). HEW requires only that within its interpretation(Handbook § 3422.2, *op. cit., supra*) a state "will find it necessary to give consideration to such situations as divorce, ... [etc.], employment away from home, service in the armed forces or other military service, and imprisonment." *Id.*

Thus, HEW permits a state to include or exclude from eligibility, persons in any of the situations identified in its regulation. Federal financial participation is available *if* the state includes within the state's eligibility policies members of any of the categories. HEW, Handbook, § 3422.4. However, the existence of the availability of federal contributions does not impose a requirement that a state define its eligibility policies to the maximum extent of liberality allowed by HEW. A state is free to draw more constricted parameters around its AFDC program than would be allowable in terms of the availability of federal funds. *Alexander v. Swank,* 314 F.Supp. 1082 (D.C.E.D. Ill. 1970), *prob. juris. noted,* 39 U.S.L.W. 3359 (U.S. February 22, 1971); *McClellan v. Shapiro,* 315 F.Supp. 484 (D.C.D. Conn. 1970); and *cf. Wyman v. James,* 400 U.S. 309 (1971). The states, in HEW's view, are limited in this regard only by what is popularly known as "Condition X" —or the "equitable treatment doctrine." See generally, *Welfare's "Condition X,"* 76 Yale L.J. 1222 (1967); Comment, *AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,* 118 U.Pa.L.Rev. 1219, 1221-25 (1970).

The HEW regulation (§ 3422.2, *op. cit., supra*) provides that a state "will find it necessary to give consideration" to various situations which the state may wish to include or exclude in its AFDC eligibility policy. California has done this, as is manifested in its regulation EAS § 42-350 (Appendix D). Each of the situations noted in the HEW regulation has been "considered" by California and children in each of the groups are considered eligible (EAS §42-350.2) except in three instances (EAS § 42-350.11), *i.e.*, when a parent is absent on "trips made in connection with current or prospective employment," or on "active duty

in the Armed Services." These are obviously three of the situations which HEW notes the state must consider, *i.e.*, situations of "search for employment, employment away from home, service in the armed forces or other military service." Handbook § 3422.2.

However, the District Court has stated that California has improperly interpreted the HEW phrase "will . . . give consideration to . . . ." According to the lower court, California considers each applicant's situation individually in situations of "imprisonment, or temporary medical treatment, or parental separation," with "no across-the-board exclusion of any of these categories," but gives "a different kind of 'consideration' " to the military-service situation by judging the group, as a group, to be ineligible. District Court Opinion, Appendix A, p. A3, *infra*. In this regard, the District Court is in error. California gives consideration to *each* group, *as a group,* listed in the HEW regulation. A child whose father is imprisoned or has been deported or who has deserted the family is treated as eligible to receive AFDC, not because of his individual situation, but because he is a member of the group which has been determined to be eligible. Similarly, the child whose father is looking for work or working away from home or is in the military is deemed ineligible because California has "given consideration" to those situations and adopted a policy of group ineligibility.

Furthermore, contrary to the District Court's determination (Appendix A, p. A3, *infra*), HEW allows, and the decision in *Damico v. California,* No. 46538, (D.C.N.D. Cal. Sept. 12, 1969)[3] does not prohibit, this type of "con-

3. This Court reversed the District Court in *Damico* on the question of exhaustion of state administrative remedies and remanded the matter. *Damico v. California,* 389 U.S. 416 (1967). On remand, the District Court invalidated the statutory and regulatory provisions of California law which imposed a three-month

sideration" and group-eligibility determination. *Damico* held, rather, that California, having "given consideration" to the situation postulated by HEW as "desertion or informal separation" (Handbook § 3422.2), and having decided that children in such situations are eligible to receive AFDC, the State could not then impose an absolute three-month waiting period as a requirement of establishing "deprivation" and eligibility. The problem in *Damico* was not that California had made a group ineligibility determination, as suggested by the District Court here (Appendix A, p. A3, *infra*), but rather, that California was arbitrarily denying aid to children who were part of a group whom California had determined to be eligible. In contrast, here, California has made the determination which HEW allows it to make, that a father's absence on military duty does not, *per se*, give rise to dependency and AFDC eligibility.[4]

As District Judge Conti stated in his dissenting opinion in this case (Appendix A, pp. A15-17, *infra*):

> "It is clear since in Section 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed forces will be treated as 'continued absence.' Under Section 3422.4 Federal financial participation is available *if* the state includes military-duty absence within its eligibility

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waiting period for AFDC eligibility for children deserted by one parent unless the remaining parent took earlier legal action to terminate the marriage. The opinion of the District Court, dated September 12, 1969, is unpublished. However, since the District Court in this case placed considerable reliance on the District Court decision in *Damico*, excerpts from the *Damico* decision are set forth in Appendix E attached hereto.

4. It should be noted that under the California regulation, military-duty absence, by itself, does not constitute "'continued absence'' which would trigger AFDC eligibility. However, if in conjunction with the military assignment, other factors, *e.g.*, a breakup of the marriage, develop, the child would then become eligibile to receive aid. California does consider other factors, but requires that there be something more than mere military-duty absence as the predicate for AFDC eligibility.

policy, but HEW requires only that 'within this interpretation [by HEW] of continued absence the state agency in developing its policy will find it necessary to *give consideration* to such situation as . . . service in the armed forces or other military service . . . .' HEW Handbook, Part IV, Sec. 3422.2 supra.

Therefore, HEW allows the State to go either way:

(1) To include servicemen; or

(2) To exclude servicemen.

California chose to exclude servicemen, and it was within its legal right to do so.

The serviceman category is a distinct and separate entity apart from the groups alluded to. Service people are transitory in nature and could pose a serious problem to the taxpayers of a state. For example, suppose the U.S. Army saw fit to move the majority or large numbers of its forces into the State of California, in said event the taxpayers of California would have to bear the additional costs of allowing AFDC grants, which could, and probably would, bankrupt the State. The HEW regulations gave the states a choice and the choice is a proper and legal one (some states have granted aid to the families of servicemen, others, along with California, have not). [Footnote omitted]

The Congress and HEW could have just as easily made *mandatory* inclusion of servicemen within the interpretation of continued absence from the home. They chose not to do so.

Some may feel that the exclusion of servicemen's children from AFDC eligibility may be a manifestation of unsound social policy, but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws 'because they may be unwise, improvident or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). In this 'era of priorities' it is encumbent upon and the duty of states, in the utilization of its tax dollars, to be ever vigilant of the welfare of its *total* citizenry. In this case, the plight of the plaintiffs should be directed to the rightful source, the U.S.

> Government . . . to do otherwise would be in violation of the state's right to exercise its right of choice under the law. California has done nothing more than exercise its right of choice after having given decision to the categories of consideration as set forth in the HEW Regulations Sec. 3422.2."

The California regulation complies with the requirements of the Social Security Act and applicable HEW regulations.

II. In Determining "Military Orphans" to Be Ineligible to Receive AFDC Benefits, California Does Not Run Afoul of the Fourteenth Amendment.

The District Court has held that the Social Security Act must be interpreted as requiring California to grant AFDC benefits to children whose fathers are in the military because a contrary construction "would raise serious questions under the equal protection and due process clauses of the Constitution." Appendix A, p. A4, *infra*. This bootstrap argument is unsound because there are no Constitutional inhibitions against the exclusion of "military orphans" from AFDC benefits.

The District Court did not "reach the Constitutional arguments advanced herein, but . . . [found] them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." District Court Opinion, Appendix A, p. A5, *infra*. It is submitted that appellees' Constitutional arguments are not compelling; indeed, they are totally without merit.

Appellees' equal protection argument as set forth in their Brief in Support of Motion for Preliminary Injunction is that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable

from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." They state that "it is difficult to imagine what basis the State could have for denying assistance to the needy families of absent servicemen when it grants the same assistance to the needy families of prisoners and deportees." Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other could not be so misapprehended by the District Court, nor could those differences so completely elude appellees.

Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security inuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children, but not prisoners' or deportees' children, is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a father. And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father may find employment in the country to which he is deported and choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing even approaching the social ostracism of imprisonment or deportation. In addition, not only is he employed, but employed by the Federal government, and extensive military "allotment" procedures exist as a means

to "insure" that part of his pay ends up in the hands of his wife and children. See generally, U. S. Department of Defense "Military Pay and Allowances Entitlement Manual."

As District Judge Conti noted in his dissent: "The affidavits of the plaintiffs [appellees] which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility . . . . [Appellees'] attacks should be on the military establishment rather than on the welfare administration of the State of California." Dissenting Opinion of Conti, D.J., Appendix A, p. A7, *infra*.

The dilemmas confronting appellees here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson* (D.C.N.D. Cal., No. 50956, Jan. 5, 1970), *aff'd* 400 U.S. 913 (1970).[5] Just as the regulations in *Macias* drew a line between the unemployed and the underemployed, the California regulation here differentiates between the *unemployed imprisoned* father and the *underemployed serviceman* father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions for, underemployment are different from those for unemployment. And "[t]he constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 319 U.S. 141; 147 (1940). The AFDC program is not designed to aid families of *under*employed "breadwinners," *King v. Smith, supra;*

5. In *Macias*, the plaintiffs challenged the constitutionality of federal and California regulations in the AFDC-U program [the so-called "Unemployed Father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. This Court approved the Congressional differentiation between the "unemployed and the underemployed" and upheld the regulations.

Macias v. Richardson, supra,[6] and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). Appellants submit that the California regulation satisfies with ease the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

Yet, appellees have urged that the "traditional equal protection test" is inapplicable here and that rather, the more stringent "compelling state interest" test of *Shapiro v. Thompson,* 395 U.S. 618 (1969), must be applied. Appellees' argument is that one of the possible reasons for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." They then urge such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. It is suggested that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" noted in *Shapiro v. Thompson, supra.*

In *Dandridge v. Williams,* 397 U.S. 471 (1970), this Court held that the ordinary "any reasonable basis" standard applies in testing social welfare laws under the Equal Protection Clause. In an obvious attempt to avoid the implications of that ruling, appellees have transposed the *duty* or "obligation of the citizen to render military service," *The Selective Service Draft Law Cases,* 245 U.S. 366, 378 (1918), into an imaginary *right* to military service. Moreover, even

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6. Certainly Congress could have included the underemployed within the purview of AFDC. Its failure to do so, however, does not invalidate the entire statutory scheme. Congress, as any legislative body, "may take one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955). And see *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1084-87 (1969).

assuming the existence of such a "right," it is not being infringed by the California regulation. Unlike *Shapiro*, where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve in the military that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus a "compelling" state interest need not be shown. *Cf. McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-808 (1969). *Dandridge v. Williams, supra*, involved classifications affecting "the most basic economic needs of impoverished human beings." 397 U.S. at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

Appellees also have asserted that the California regulation "is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." What is wrong with appellees' assertion in this regard is that they have neglected to put quotation marks around the two words "continuously absent." Had they done so, "continuous absence" would correctly be denoted as the "words af art" that they are, deriving meaning only within the context in which they are used in the Social Security Act. See 42 U.S.C. § 606(a). Having done thus, the "presumption" of noneligibility of children of servicemen is neither arbitrary and capricious nor irrational. Rather, it is in conformity with the Congressional purposes underlying the AFDC program of providing assistance to families who lack a breadwinner. *King v. Smith*, 392 U.S. 309 (1968).

Stripped to its essentials, appellees' due process contentions represent little more than an expression of their view

that the exclusion of servicemen's children from AFDC eligibility manifests unsound social policy. However, the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co., supra,* 348 U.S. at 488. As this Court stated last term, "that era long ago passed into history. *Ferguson v. Skrupa,* 372 U.S. 726." *Dandridge v. Williams, supra,* 397 U.S. at 484-5.

CONCLUSION

It is submitted that the decision of the District Court misapprehends the requirements of the Fourteenth Amendment with the result that the court has interpreted the Social Security Act to impose mandatory eligibility requirements in the AFDC program which Congress did not intend. The result of the District Court's ruling is to view the Social Security Act as establishing a national welfare policy. This view of the federal Act is directly contrary to the long-standing administrative interpretations given it by the United States Department of Health, Education and Welfare. Instead of giving this authoritative interpretation the deference which it is properly due, *Cf. Lewis v. Martin,* 397 U.S. 552, 559 (1970), the District Court has ignored it. Appellants believe that the District Court has erred, that the questions presented by this appeal are substantial and that

they are of great nationwide, public importance. It is urged that probable jurisdiction be noted.

Dated: June 1, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

Majority and Dissenting Opinions Below

Original Filed Mar. 31, 1971
Clerk, U.S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

CASE NO. C-70 2273 ACW

ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DISSENTING OPINION OF JUDGE CONTI ATTACHED

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

BEFORE: HAMLIN, U. S. Circuit Judge; CONTI and WOLLENBERG, U. S. District Judges.

California participates in the federal aid to needy families program. 42 U.S.C. § 601 *et seq.* Part of this program gives aid to needy children who are "deprived of parental support or care by reason of the . . . continued absence from the home . . . of a parent".

Plaintiffs are mothers whose husbands are absent from home while on duty with the armed forces of the United States. Plaintiffs receive monthly allotment checks from the military, but such checks seldom if ever total more than

$150.00 per month.[1] The State does not contest that both plaintiffs, as well as many other military dependents, could easily demonstrate the "need" required by the statute cited above. The State does claim, however, that absence occcasioned by a father's military duties can never be "continued" within the meaning of 42 U.S.C. § 601. California Department of Social Welfare Regulation EAS section 42-350.1.[2]

Plaintiffs challenge this state-wide regulation on both statutory and constitutional grounds, and ask that the Court enjoin its enforcement. A three-Judge court was appointed. See *King v. Smith,* 392 U.S. 309 (1968) (note 3); and *Gilmore v. Lynch,* 400 F.2d 228 (1969). Memoranda were submitted, and by agreement of both parties, hearings on plaintiffs' motions for preliminary and final relief, as well as on defendants' motion for summary judgment, were consolidated. Said hearing being held, the matter was taken under submission.

The federal Act mandates that aid be given "with reasonable promptness to all eligible individuals". 42 U.S.C. § 602 (a) (10). An eligible child, within the present context, is one whose parent is absent from the home on a "continued"

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1. Plaintiff Joyce Dones, with two young children, and a baby soon to be born, receives $145.00 as her allotment from the Army. Prior to his induction, Mr. Dones earned approximately $600.00 per month in civilian employment. Plaintiff Nancy Remillard is the mother of one child. Her husband is an enlistee now serving in Vietnam; her allotment totals $130.60, which sum has often been delayed for considerable periods due to bureaucratic errors.

2. "'Continued absence' exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties [or] a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions. 'Continued absence' does not exist when one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.'

basis, which absence deprives the child of support and care. The precise definition of "continued absence" rests with the States, but regulations of the Department of Health, Education and Welfare provide specific guidelines for this decision:

> "Within this interpretation of continued absence *the State* agency in developing its policy *will find it necessary to give consideration* to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or other military service,* and imprisonment." HEW, Handbook of Public Assistance Administration § 3422.2 (emphasis added).

The key to the instant dispute is the phrase "will . . . give consideration to . . . ." In cases of a father's absence due to imprisonment, or temporary medical treatment, or parental separation, California considers each applicant's situation individually. There is no across-the-board exclusion of any of these categories listed in the HEW regulation.[3] But children of fathers absent on military orders get a different kind of "consideration". California claims that it has judged this group, *as a group,* and has decided it is to be deemed ineligible for § 606 payments.

This blanket exclusion of an entire group, specifically designated in the regulation as worthy of consideration, is reminiscent of California's one-time practice of conclusively presuming that informal parental separations did not result in "continued" absence until three months had passed. A three judge court of this circuit refused to find this all-

3. Counsel for the State was uncertain of California's policy as to persons employed away from home. The Court does not express any opinion as to the validity of the State's exclusion or inclusion of this group from §606 benefits.

encompassing declaration of ineligibility consistent with the policies behind § 606. The latter is designed for the sustenance of needy children. *King v. Smith,* 392 U.S. 309 (1968). The Court found that it might have been administratively convenient to "give consideration" to an entire group and thereby totally exclude it.

But the three judges found that such a device wrongly denied aid to many children who, if given individual consideration, would have been able to show a disruption of family support patterns every bit as grave as that caused in situations where the family breadwinner has been imprisoned or deported, and where § 606 payments are given. *Damico v. California,* No. 46538 (N.D. Calif. Sept. 12, 1969).

The State suggests that the real cause of plaintiffs' distress is not the absence of their spouses but is rather the inadequacy of military pay scales. "Cause" is a nebulous term which in this case may well encompass the factor of low pay. But it also includes the disruption caused by precipitately depriving a man of his civilian employment, assigning him to duty posts to which dependents may not accompany him, and making it necessary for the mother to rely on the tender mercies of the military allotment system. Congress, in its traditional solicitude for the soldier and his dependents, has shown a realization that military service represents, for many families, a disruption or dissociation as great as that envisaged by both HEW and California regulations.

In interpreting any statute, the courts will presume if at all possible that Congress would not act in a manner offending due process reasonability. The interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution. All legislative classifications must be reasonable in light of

the goals of the statutory program of which they are a part. *Dandridge v. Williams,* 397 U.S. 471 (1970); *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1067, 1077 *et seq.* It is difficult to see what legitimate goal is served by the classification here. California will give aid to the needy child of a prisoner whose term may be as little as ninety days. The state will also help the dependents of a divorced mother whose support payments from her absent husband are insufficient to meet basic needs. A parental spat may result in an informal separation of but a few weeks duration, but § 606 payments are available if dependent children are in want as a result thereof. But nothing is given to the needy child of a soldier who, often involuntarily, may remain away from home for as long as two years. This distinction might have been deemed rational at the time the AFDC program was instituted, when the armed services were composed of small numbers of long-term volunteers. It is doubtful whether it can pass muster today, when world tensions require the maintenance of large overseas contingents of draftees and non-career enlistees. See *Chastleton v. Sinclair,* 264 U.S. 543 (1924) (due process rationality to be judged in light of contemporary circumstances); and *People v. Belous,* 80 Cal. Rptr, ...(1970) (same). This court will not reach the constitutional arguments advanced herein, but it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California.

The Court therefore declares that California may not deny benefits under 42 U.S.C. § 606 to otherwise eligible children by means of the conclusive presumption, embodied in the regulation cited above at note 2, that a parental absence is not "continued" if occasioned by service in the armed forces of the United States. Some military absences

may indeed be temporary; there comes to mind the situation posed by the career serviceman who *chooses* not to bring his family to a duty station. But other military absences give rise to the needs the statute was designed to fill. Each case must be considered in light of *all* relevant factors. *Damico v. California, cit. supra.*

Accordingly, IT IS HEREBY ORDERED that defendants herein are enjoined from enforcing California Department of Social Welfare Regulation EAS section 42-350.1 in a manner inconsistent with the declaration entered above. Execution of this Order is stayed for a period of ten days to allow the defendants to file notice of appeal if they so desire, except that the temporary restraining order hitherto issued shall remain in effect as to plaintiffs Dones and Remillard. Further stays of execution will only be considered upon timely application to the Court.

Dated: March ..., 1971

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District
Judge

United States District Court
Northern District of California

No. C-70 2273 ACW

NANCY REMILLARD, et al.,
Plaintiffs,

vs.

ROBERT B. CARLESON, et al.,
Defendants.

BEFORE: HAMLIN, U. S. Circuit Judge;
CONTI and WOLLENBERG, U. S. District Judges.

CONTI, D. J.:

I dissent from the opinion of the majority.

This case involves the question of whether California may lawfully or constitutionally refuse to grant Aid to Families with Dependent Children (AFDC) benefits to needy families where the absence of a parent is due to his military service. This case does not involve the question of whether plaintiff's family is needy, as the family clearly falls within California's definition of what constitutes a needy family. The affidavits of the plaintiffs which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility; their attacks should be on the military establishment rather than on the welfare administration of the State of California.

The question here presented is squarely one of the intent of Congress; the language of the statute and the

rights of States to make their own rules in accordance with the Act without legislation by the Federal Courts.

California participates in the Federal Government's AFDC program, which was established by the Social Security Act of 1935. The Act's purpose is to aid needy children who have been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity of a parent. . .

The State of California, in order to receive Federal funds for the AFDC program, is required to submit a plan to the Secretary of Health, Education and Welfare (HEW). The plan must conform to the Social Security Act and to the regulations promulgated by HEW.

The legislative history of the original Social Security Act discloses an intention to leave considerable flexibility to the States in fashioning the eligibility standards to be applied in their AFDC programs. Thus, the committee reports, in discussing the prohibition in the Social Security Act, Sec. 402(b) of durational residence requirements in excess of one year, state:

> "The State may be more lenient than this, if it wishes. It may, furthermore, impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit."
>
> H.R.Rep.No.615, 74th Cong., 1st Sess.24 (1935).
> S.Rep.No.628, 74th Cong., 1st Sess.35-36 (1935).

The Congressional debates shed light on another dimension of the same question. One element of the definition of "dependent child" in the original Sec. 406[1], as now, is that

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1. Sec. 406 when used in this title—
"(a) The term 'dependent child' means a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who

the child be living in the home of one of the relatives enumerated in the Act. However, it was clear the States might choose to exclude children living with certain of those relatives:

> "A State will not have to aid every child which it finds to be in need. Obviously, for many States, that would be too large a burden. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives. The provisions are not for general relief of poor children but are designed to hold broken families together." 79 Cong.Rec.9269 (1935). (Remarks of Senator Harrison)

While there is no legislative history containing comparable statements with respect to age, (1) the intent to leave the description of eligibility to the States in the areas documented above and (2) the fact that the list of relatives and the age limit are dealt with in parallel fashion in the definition of "dependent child", support the conclusion that similar latitude was to remain available to States to impose lower age requirements. And there is *no* affirmative evidence to support an argument that age should be treated any differently from any other element of the definition.

The general intention of the Congress is indicated by the language contained, then and now, in Sec. 401 and corresponding sections of the other titles of the Act, that the purposes of the statute are directed to "enabling each State to furnish financial assistance, as far as practicable under the conditions in each State," to needy dependent children or the other designated groups.

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is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home;

(b) The term 'aid to dependent children' means money payments with respect to a dependent child or dependent children."

Whether a state would cover all those encompassed by the Federal matching definition depends on what, from the State's viewpoint, is practicable in the State, whether such coverage relates to an age limit or participation in a particular program, such as Aid to the Blind.

Further, it should be noted that the Congress did consider and legislate with respect to the matter of exclusions of dependent children from the program. Under Sec.402(b) the Department could not approve any plan which imposed a durational residence requirement of a year or more. This was done with the knowledge that many States were currently implementing, in their own relief programs, eligibility requirements which demanded residence far in excess of one year. In summary, the Congress directed approval of any State plan for Aid to Dependent Children which complied with the requirements of Sec.402(a), and did not contain any of the restrictions prohibited by Sec.402(b). Neither of these subsections dealt (nor does either currently deal) with the question of age limits below those adopted to delineate the bounds of Federal matching.

The statutory pattern of Title IV, part A, and its legal implications are repeated and reinforced in the other public assistance titles of the Social Security Act.

Title I of the Social Security Act[2], authorizes the Federal-State program for Old-Age Assistance. In the original act the statutory pattern of Title IV was followed in Title I. However, with respect to the aged, the Congress did not wish to give the States freedom to set eligibility requirements predicated upon age. Thus, while the Act defined "old-age assistance" (i.e., those payments by States which would earn Federal matching) as "money payments to aged individuals," Sec.2(b), (which corresponds to Sec.402

2. 42 U.S.C.301 et seq.

(b) in Title IV) prohibited approval of a plan which imposed an age requirement of more than 65.[3]

Similarly Title X[4], establishing the program of Aid to the Blind, shows a Congressional awareness of the issue of permitting an age limitation. Unlike the program of old-age assistance, Sec.1002(b) (corresponding to Secs.2(b) and 402(b)), which enumerated the limitations on eligibility, contained no provision relating to age. As is apparent from the legislative history of Title X, the Congress was aware of this omission. The Senate Report said:

> "The liberality of the eligibility requirements, which a State plan must contain, are worded in a similar fashion to paragraphs (2) and (3) of section 3(b) [pertaining to old age assistance plans]. These relate to residence and citizenship. In the State plan for aid to the blind no limitation is placed upon any age requirement which the State may impose."
> S.Rep.No.628, 74th Cong., 1 Sess.52 (1935).

Several conclusions follow logically from the foregoing:

(1) In 1935 Congress was aware of the possibility that States would impose conditions based on age as part of the eligibility requirements for the Federal-State public assistance programs;

(2) Congress legislated without ambiguity where it wished to express a policy in this regard (e.g., Old-Age Assistance); and

(3) The statutory provisions prohibiting exclusion (or requiring inclusion) of all members of a certain class were placed in Sections 2, 402, and 1002, the sections pertaining to State plans. Consequently the question of an individual's

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3. Except that until January 1, 1940, States were allowed to impose a requirement of 70 years.

4. 42 U.S.C. 1201 et seq.

eligibility yis-a-vis the State was never dealt with in the definitions contained in Sections 6, 406 and 1006, which only set forth the outer limits of Federal financial participation.

> Equitable treatment of individuals within a Congressionally-defined class requires reasonable classifications in light of the purposes of the Act and Section 406(a) may be relevant to the determination of reasonableness.

Although the States are given wide latitude to frame eligibility standards for their public assistance programs, their discretion is not absolute. States have always been limited by the enumeration of certain prohibited eligibility conditions discussed supra. In addition, since the earliest days of the administration of the Social Security Act, the states' freedom to fashion their programs has been circumscribed by what has come to be known as the (constitutional) doctrine of equitable treatment.

Soon after the enactment of the Social Security Act it became apparent that administrative interpretation would be necessary in order to preclude the States from making unreasonable classifications within their public assistance programs. The principle requiring that States provide equitable treatment of persons in like circumstances was formulated, based upon a principle of Constitutional law, the overall purpose and intent of the public assistance titles, the legislative history of the Act and individual plan requirements. This principle has been applied repeatedly over the past thirty-three years.

It has been applied by the Department to prohibit arbitrary exclusions of persons who come within the scope of the matching definition, where the criteria upon which the exclusion is based bear no reasonable relationship to the purposes or scheme of the Federal statute. For example the Department has consistently refused to allow States to

fashion their public assistance plans to exclude Indians or illegitimate children, as such. Since the criteria set out in the definitions in Section 406 are often indicative of the obectives of the program, they may have a bearing on the conclusion which the Department reaches concerning whether a particular State eligibility requirement results in equitable treatment.

Thus, while Section 406 enumerates various relatives with whom the needy child must be living, States are not required to include all such relatives within their implementing definition of "dependent child." It is clear that one of the original purposes of Title IV was to provide assistance to needy children living in homes in a family-like setting and it has not been considered inconsistent with equitable treatment for a State to exclude children who are living with relatives of the most distant degree of relationship enumerated in the statute.[5] Conversely, were a State to propose a definition of "dependent child" for purposes of its AFDC program which included children living with any of the enumerated relatives *except* the natural mother or father, such a proposal would be unacceptable to the Department. It would not violate any express provision of Title IV but clearly would be so contrary to one of the purposes of the statute as to be violative of equitable treatment.

Since a State may narrow the definition of "dependent child" for purposes of establishing criteria for its AFDC program, so long as it does not result in an unreasonable classification, the failure of a State to take advantage of a liberalization of the definition by the Congress is not considered unreasonable. In other words, if a State elects

5. Such a result is clearly supported by the remarks of Senator Harrison, supra, p.3.

to retain a classification that had, prior to an amendment to Title IV, set the outer bounds of Federal matching, that classification cannot be said to be inconsistent with the purposes of the Act since it represents a classification previously made by the Congress.

HEW interprets the "continued absence" requirement for "dependency" and AFDC eligibility in a fashion consistent with the above. HEW's interpretation of the continued absence requirement is set forth in Part IV of the Department's Handbook of Public Assistance Administration", which, in Section 3422.2 thereof provides as follows:

> "3422. *Continued Absence of the Parent from the Home.*
>
> 3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
>
> 1. When the parent is out of the home;
> 2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
> 3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.
>
> A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent being counted on for support or care of the child. For example: the child's father has left home, without forewarning his family, and the mother really does

not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment."

It must be noted that the HEW interpretation is a strict one. The absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." HEW gives as an example of the type situation falling within its interpretation the case where the father deserts the family and disappears. Thus, HEW treats the "continued absence" situation as something akin to death or incapacity, treating all three situations alike, requiring that dependency of a needy child arises only upon a serious and substantial destruction of the expectation of economic protection being available to a child from his parent.

It is clear since in Section 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed forces will be treated as "continued absence." Under Section 3422.4 Federal financial participation is available *if* the state includes military-duty absence within its eligibility policy, but HEW requires only that "within this interpretation [by HEW] of continued absence the state agency in developing its policy will find it necessary to *give consideration* to such situations as . . . service in the armed forces or other military service . . . ." HEW Handbook, Part IV, Sec. 3422.2 supra.

Therefore, HEW allows the State to go either way:

(1) To include servicemen; or

(2) To exclude servicemen.

California chose to exclude servicemen, and it was within its legal right to do so.

The serviceman category is a distinct and separate entity apart from the groups alluded to. Service people are transitory in nature and could pose a serious problem to the taxpayers of a state. For example, suppose the U.S. Army saw fit to move the majority or large numbers of its forces into the State of California, in said event the taxpayers of California would have to bear the additional costs of allowing AFDC grants, which could, and probably would, bankrupt the State. The HEW regulations gave the states a choice and the choice is a proper and legal one (some states have granted aid to the families of servicemen, others, along with California, have not.[6]

---

6. A State Survey submitted by plaintiffs in *Stoddard v. Fisher*, Civil No. 71-168 (S.D.Maine) which indicates:

(1) Twenty-two states give aid to all servicemen's families (Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia);

(2) Twenty-one states give no aid to the families of servicemen (Alabama, Arkansas, California, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Puerto Rico, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, Wyoming);

(3) Two states limit aid to the families of draftees (Idaho, Maine);

(4) Two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft (Iowa, Vermont);

(5) Five states did not participate in the survey (Kentucky, Nevada, Tennessee, Utah, Washington. Of these last five states, the Bureau of Social Science Research in Washington, D.C. has submitted to plaintiff information that Kentucky, Utah and Washington do grant AFDC to Military families. This brings the total number of states that do grant AFDC benefits to military families to twenty-five.

The Congress and HEW could have just as easily made *mandatory* inclusion of servicemen within the interpretation of continued absence from the home. They chose not to do so.

Some may feel that the exclusion of servicemen's children from AFDC eligibility may be a manifestation of unsound social policy, but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). In this "era of priorities" it is encumbent upon and the duty of states, in the utilization of its tax dollars, to be ever vigilant of the welfare of its *total* citizenry. In this case, the plight of the plaintiffs should be directed to the rightful source, the U.S. Government . . . . to do otherwise would be in violation of the state's right to exercise its right of choice under the law. California has done nothing more than exercise its right of choice after having given decision to the categories of consideration as set forth in the HEW Regulations Sec. 3422.2.

I would find that the California Department of Social Welfare Regulation EAS Sec.42-350 is constitutional, and that defendants are entitled, therefore, to a judgment in their favor as a matter of law.

Dated: March 26, 1971.

/s/ Samuel Conti
United States District Judge

Appendix B

Stay of Execution of Judgment Below

Original Filed Apr 13 1971
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

CASE NO. C-70 2273-ACW

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

STAY OF EXECUTION OF ORDER GRANTING INJUNCTIVE RELIEF

BEFORE: HAMLIN, U. S. Circuit Judge; CONTI and WOLLENBERG, U. S. District Judges.

Defendants having moved the Court to stay, pending appeal to the Supreme Court of the United States, the Order entered herein on March 31, 1971, enjoining enforcement of California Department of Social Welfare Regulation EAS section 42-350.1, and the Court having considered the papers in support of said motion and being fully advised in the premises,

IT IS HEREBY ORDERED that execution of the Order of March 31, 1971 enjoining enforcement of California Department of Social Welfare Regulation EAS section 42-350.1 be, and the same is, stayed until a decision is rendered herein by the Supreme Court of the United States.

The above granted stay shall not apply to plaintiffs Dones and Remillard, who shall continue to receive benefits under the Temporary Restraining Order issued hitherto.

Dated: April 13, 1971

/s/ OLIVER D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

/s/ SAMUEL CONTI
United States District Judge

Appendix C

Notice of Appeal

Original Filed Apr 7 1971
Clerk, U. S. Dist. Court
San Francisco

United States District Court
Northern District of California

NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that, pursuant to Title 28, United States Code section 1253, the above-named defendants hereby appeal to the Supreme Court of the United States from the Order Granting Declaratory Judgment and Injunctive Relief, entered herein on March 31, 1971, permanently enjoining said defendants from enforcing California Department of Social Welfare Regulation EAS Section 42-350.1.

DATED: April 6, 1971.

EVELLE J. YOUNGER,
Attorney General of the
State of California

/s/ JAY S. LINDERMAN
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL W. BAKER,
Deputy County Counsel

Attorneys for Defendants.

Appendix D

Statutes Involved

United States Code

42 U.S.C. § 601

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. § 602(a)(10)

A State plan for aid and services to needy families with children must . . . provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 606(a)

The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister,

stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment....

HEW, "Handbook of Public Assistance Administration," Part IV

3422. *Continued Absence of the Parent from the Home*

3422.2 *Interpretation*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not

know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment.

California Department of Social Welfare, "Public Social Services Manual"

EAS 42-350 CONTINUED ABSENCE OF A PARENT

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

.12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 *Circumstances That Meet the Definition of "Continued Absence"*

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

.21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinement in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

.23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

.24 The court has issued an injunction forbidding the parent to visit the spouse or child.

.25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.

.26 Both parents are physically out of the home and their whereabouts are not known.

Appendix E

Excerpts From Memorandum Opinion and Order of United States District Court, Northern District of California, Entered on September 12, 1969, in Damico v. California, No. 46538

We find it unnecessary to reach the constitutional issues presented. We find the statutes and regulation in question plainly in conflict with the controlling federal statute and the primary purposes of the AFDC program.

Section 406(a) of the Social Security Act defines a "dependent child" as a "need child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ." 42 U.S.C. § 606(a). This section was one of those interpreted in *King v. Smith,* 392 U.S. 309 (1968). The Supreme Court there held Albama's "substitute father" regulation under AFDC invalid as inconsistent with the Act. In reaching its decision, the Court undertook a full examination of the legislative history of the AFDC and the purposes of the program, and concluded that "Congress has determined that . . . protection of [dependent] children is the paramount goal of AFDC." 392 U.S. at 325. We must analyze the statutes challenged here in light of that paramount goal.

Reading §§ 11250(b) and 11254 together with regulation 42-311, the practical effect of the state scheme is to establish a rigid three-month waiting period for children deserted by one parent, unless the remaining parent takes legal action to terminate the marriage. These provisions have been strictly interpreted by the State Department of Social Welfare to deny claimants the opportunity to present any evidence regarding the "continued" nature of the absence of a parent, when the three-month requirement has not been met. *See* State Decision No. 27-30, Department of Social Welfare, February 23, 1968.

The federal statute contains no such rigid waiting period to establish a continued absence. Nor is such a provision found in the interpretation of the "continued absence" requirement by the Department of Health, Education and Welfare (HEW):

> 3422.2 Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
>
> 1. When the parent is out of the home;
> 2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
> 3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.
>
> A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

HEW, Handbook of Public Assistance Administration, Pt. IV, § 3422.2 (1968).

The HEW interpretation recognizes that it is the nature of the absence under all the surrounding circumstances that determines whether the absence is "continued" as required by the statute. To say that, in the absence of legal action, no absence is "continued" until three months have elapsed is to deny aid to otherwise eligible needy children whose circumstances could clearly demonstrate an uninterrupted and non-temporary absence of a parent.

Furthermore, Regulation 42-311, in identifying factors defining continued absence, provides that if the parents separate without legal action, *deprivation* begins three months from the date of separation, while in case of separation with legal action, deprivation exists from the time the parent leaves the home. While the presence or absence of legal action may be one relevant factor in determining whether there is continued absence, it is completely irrelevant in determining whether there is deprivation; for that question must focus on the child, not on the legal status of the parents. By defining "deprivation" in such an arbitrary manner, the regulation clearly puts administrative convenience ahead of the welfare of the needy children. This is not permitted under the federal Act. *King v. Smith, supra.*

Defendants argue that the three month period is valid since it promotes a legitimate state objective in preventing fraud and collusion between parents for the purpose of obtaining welfare. A similar argument was rejected in *King v. Smith.* The Court there recognized the state's legitimate goal of preventing immorality and illegitimacy but held that the parent's wrongdoing should not be used to deprive the children of aid, since the state had other methods it could use to deal with such problems, 392 U.S. at 325-27. The same is true here. The state has many possible ways to check the reliability of information gathered from potential recipients, and thereby prevent fraud *ab initio.* It also may punish those who are subsequently found to have obtained benefits fraudulently. But it may not, consistently with the AFDC program, deny benefits to many eligible and needy children in order to avoid granting benefits to those few children whose parents have applied fraudulently.

Defendants further argue that the three-month waiting period furthers the legitimate state interest of keeping families together, since parents will be less likely to sepa-

rate if they know the children will have to wait three months for aid. This legitimate interest is clearly promoted by means impermissible under the federal Act, because it postulates deprivation of the children as the club to keep the parents together. Moreover, the argument does not focus on the crucial inquires which must be made: Are the children eligible and needy? Is the absence of the parent "continued"? Finally, it is not clear that the interest is even furthered by means of the waiting period. An affidavit submitted by an attorney in the Watts office of the Los Angeles Neighborhood Legal Services Society, Inc., indicates that of the over 600 divorce actions in that office alone in 1967, approximately 50% were filed simply to qualify the families for aid. A requirement that so encourages legal separation of the parents does not "help maintain and strengthen family life" as required by the federal statute. 42 U.S.C. § 601.

We hold that under the Social Security Act, the state may not deny AFDC benefits to otherwise eligible children by means of a conclusive presumption that an absence is not "continued" before the expiration of three months. In so ruling, we do not hold that the state may not set up a reasonable time period as a rebuttable evidentiary guide to determine what constitutes a "continued absence" in the absence of other factors. The state correctly argues that "continued absence" cannot be attained in an instant but must endure for some period. Conversely, however, the "continued" nature of the absence may be apparent, in an appropriate case, from the very early days of the separation. Protection of the needy children deprived by such an absence is required by the federal Act. We hold only that the Department of Social Welfare must, in passing upon an application for

Aid to Families with Dependent Children, consider *all* relevant factors in determining whether the particular absence is "continued."

The above determination makes it unnecessary to consider or pass upon the constitutional issues raised, and we express no opinion on their merits.

Nos. 70-250, 70-5305

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT B. CARLESON, ET AL., APPELLANTS

v.

NANCY REMILLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FLORENCE DIGESUALDO, ET AL., APPELLANTS

v.

CON F. SHEA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,

RICHARD B. STONE,
Assistant to the Solicitor General,
Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

Cases:

Constitution, statutes and regulations:

Constitution, statutes and regulations—Continued

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief *amicus curiae* is submitted pursuant to the Court's invitation of October 12, 1971.

QUESTIONS PRESENTED

This brief will discuss the following questions:

1. Whether state welfare programs, in order to be eligible for federal matching grants under the Aid to Families with Dependent Children (AFDC) program, must extend aid to all categories of children included within the definition of "dependent child" under Section 406(a) of the Social Security Act, 42 U.S.C. 606(a).

2. Whether the Colorado AFDC program, which excludes from AFDC coverage children between the ages of 16 and 18 who do not attend school, and the California AFDC program, which precludes aid to families in which parental absence is due to military service, are valid exercises of state discretion to determine AFDC eligibility under the Social Security Act.

STATEMENT

The Federal Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. §§ 601-610, is one of six federally-aided public assistance programs established by the Social Security Act for various categories of needy persons.[1] Each of these programs

[1] These programs are: Grants to States For Old-Age Assistance and Medical Assistance for the Aged, 42 U.S.C. 301, *et seq.*; Aid to Families With Dependent Children, 42 U.S.C. 601-610; Grants to States For Aid to the Blind, 42 U.S.C. 1201, *et seq.*; Grants to States For Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351 *et seq.*; Grants to States for Aid to the Aged, Blind, or Disabled, 42 U.S.C. 1381, *et seq.*; Grants to States For Medical Assistance Programs, 42 U.S.C. 1396, *et seq.*

is jointly financed by the states and the federal government and administered by the individual states or by political subdivisions under the supervision of the state. It is optional with each state whether it wishes to participate in any or all of the programs. If a state chooses to participate in one of the programs, it submits a plan of administration to the Secretary of Health, Education, and Welfare; if the plan meets the requirements set forth in the pertinent title of the Social Security Act, the Secretary approves the plan. The federal government then provides matching grants-in-aid to the state within the limits of the provisions of the Social Security Act setting forth the scope of federal financial participation.

For AFDC, the requirements for obtaining the Secretary's approval of a state plan are contained in Section 402 of the Social Security Act, 42 U.S.C. 602. Sections 406, 407, and 408 of the Act, 42 U.S.C. 606, 607, 608, define the class of persons in whose behalf the state may receive federal matching funds under the AFDC program. Section 402(b) provides that the Secretary "shall approve" any plan which fulfills the conditions specified in Section 402 (a). Conversely, the Secretary has interpreted Sections 406, 407, and 408 not as a listing of persons who must be included in state plans, but as a broad definition of the class of persons with respect to whom federal matching payments will be made if they are included in a state AFDC plan.

In both of the instant cases, appellants contend that state AFDC plans approved by the Secretary

are invalid because the class of persons eligible for aid under the state plan is smaller than the class defined in Section 406 of the Act.

Digesualdo is a class action by two children over the age of 16 but under the age of 18, and their mothers, seeking to compel Colorado and Denver County Welfare officials to resume payment of AFDC benefits which were terminated when the children ceased regularly attending school. The benefits were denied under a Colorado State regulation (IV Colo. Dept. of Soc. Serv. Staff Manual of Pub. Assis. § 4234.1) which permits AFDC payments only for those children aged 16 to 20 who are "in regular attendance at a public or private school, high school, trade school, college or university * * *." Appellants contend that the Social Security Act requires that Colorado provide assistance to all persons who meet the definition of "dependent child" set forth in section 406(a) of the Act, 42 U.S.C. § 606(a), which includes needy children under 18, who are not in school.[2] Appellants also contend that denial of assistance to such children violates sections 402(a)(19) (requirement of Work Incentive Program referral) and 402(a)(7) (income and resources taken into account in determining need) of the Act. 42 U.S.C. §§ 602(a)(19); 602(a)(7). Alternatively, appellants argue that Colorado's school attendance requirement

[2] We believe that the eligibility restrictions at issue in *Digesauldo* and *Carleson* are valid under this Court's decision in *Dandridge* v. *Williams*, 397 U.S. 471, and we do not discuss appellant's Equal Protection and Due Process arguments.

for 16 and 17-year-olds violates the Equal Protection and Due Process Clauses.[3]

The three-judge district court, convened pursuant to 28 U.S.C. §§ 2281, 2284, upheld the Colorado regulation. Upon examination of the Social Security Act and the legislative history of Section 406(a), the court concluded that states are not required to use the federal definition of dependent child in their AFDC programs. The court also held that denial of AFDC benefits to needy children who are not in school does not violate the Constitution.

Carleson is a class action by a two-year-old child and her mother, whose husband is away from home on active duty in the United States Army, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11. California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a needy child "deprived of parental support * * * by reason of the * * * continued absence from the home * * * of a parent" is deemed eligible for AFDC benefits. Social Welfare Regulation EAS § 42.350.11 excludes absence due to "active duty in the Armed Services" from the definition of "continued absence" which California uses to test eligibility for AFDC benefits. The majority of the three-judge court (Judge Conti dissenting) upheld the

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[3] Plaintiffs do not question Colorado's exclusion of 18-20-year-olds not attending school, presumably because children in this age bracket are not eligible for federal matching funds under Section 406(a) unless they attend school.

plaintiffs' contention that the Social Security Act does not permit a state to exclude as a group dependent children whose parents are absent due to military service, though it indicated that the state could provide for a case-by-case factual determination as to whether military service creates the need required to justify the payment of AFDC benefits.[4]

ARGUMENT

I. The Social Security Act Does Not Require the States to Provide AFDC Benefits for All Persons with Respect to Whom Federal Matching Payments Can Be Made.

In both of these cases welfare recipients attack the validity of state law provisions which limit Aid to Families with Dependent Children to a class of children narrower than that for which federal matching funds would be available under the definition of "dependent child" in Section 406(a) of Title IV of the Social Security Act, 42 U.S.C. 606(a). Section 406(a) provides:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grand-

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[4] The court declined to rule on plaintiff's constitutional attack on the California regulation, though it noted that the "interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution" (*Carleson* J.S. App. 4).

> mother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

The appellants in *Digesualdo*, the appellees in *Carleson*, and, implicitly, the district court in *Carleson*, construe the Social Security Act as requiring states to provide AFDC to all persons who meet the definition of "dependent child" in Section 406(a). In *Digesualdo*, appellants contend that Colorado must furnish assistance to children between the ages of 16 and 18 regardless of whether they are attending school. In *Carleson*, appellees contend that California must make assistance payments to otherwise qualified children if the "continued absence" of a parent is due to military service.

Earlier this Term, in *Alexander* v. *Swank* (Nos. 70-5032 and 70-5021) and *Carter* v. *Stanton* (No. 70-5082), now pending before this Court for decision, we submitted a brief *amicus curiae* setting forth our views on questions closely related to those presented in the instant cases. Indeed, in *Alexander* appellants attacked the validity of an Illinois provision excluding from AFDC coverage dependent children aged 18-20 attending college, thereby bringing into

question the mandatory nature of the federal definitional provisions relating to the age and school status of welfare recipients; and in *Carter* appellants attacked the validity of an Indiana provision defining "continued absence" for purposes of AFDC eligibility as a minimum of six months, thereby bringing into question the content of the term "continued absence" as used in the Social Security Act and the mandatory applicability *vel non* of that term to state AFDC plans.

We pointed out to this Court in *Alexander* and *Carter* that as a policy matter, the Department of Health, Education and Welfare believes and has strongly recommended that state AFDC programs should provide the maximum coverage allowed by the Social Security Act (See *Alexander* Br., pp. 8-10), and that the Department disapproves of the policies reflected in both of the state provisions challenged in that case. Similarly, in this case the Department does not believe that either the Colorado or California restriction on AFDC eligibility is desirable.

As in *Alexander* and *Carter*, however, the question in these cases is not whether the state AFDC plans are entirely harmonious with the general policies of the Department of Health, Education and Welfare, but whether they are consistent with the Social Security Act. More specifically, the issue is whether and in what circumstances that Act permits the states to define eligibility in terms narrower than the statute's definitions of the categories of children for which federal matching funds will be available.

With respect to this question, the Department's position, reflected consistently throughout its administration of the AFDC program, is that states may make reasonable classifications limiting the persons to whom they will provide AFDC.

In our brief in *Alexander* and *Carter* (pp. 12-28), to which we refer the Court,[5] we set forth at length the reasons in support of HEW's view that the definitional provisions of the Social Security Act are not mandatory. Basically, we contend that this interpretation is consistent with the structure of the statutory provisions governing the administration of AFDC. Analysis of these provisions indicates that Section 402, which enumerates twenty-three criteria which state plans must meet in order to obtain the Secretary's approval, is the sole provision specifying mandatory requirements for those plans. The Department's interpretation is also fully supported by the legislative history of the definitional provisions of the Act, which repeatedly illustrates Congress' intention that the expanding federal definitions set outside limits, and are optional with the states. We believe that this Court's holding in *King* v. *Smith*, 392 U.S. 309, which invalidated an Alabama provision precluding AFDC payments to families in which the mother "cohabits" with a man, is consistent with the Department's view that state plans are not invalid merely because they do not define eligibility in terms as broad as those enumerated in the Act, but

[5] We have served a copy of our brief in *Alexander* and *Carter* on counsel in these cases.

are invalid only if the limitation in question is inconsistent with the purposes of the Act.[6]

We disagree with the *Carleson* court's suggestion that the Court's reference in *King* (392 U.S. at 333) to Section 402(a)(10) of the Act, providing that states shall "furnish 'aid to families with dependent children * * * with reasonable promptness to all eligible individuals * * *'" indicates a contrary view. Read in context, that statement indicates not that the Court interpreted Section 402(a)(10) as imposing federal eligibility definitions on the states, but

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[6] The Court appears to have adopted a similar standard with respect to procedural requirements for AFDC eligibility contained in state AFDC plans; *i.e.*, the requirement is valid unless it runs afoul of a purpose of the Act. Compare, *e.g.*, *Wyman* v. *James*, 400 U.S. 309, in which the Court upheld a requirement that AFDC recipients permit caseworkers to make home visits to ascertain whether the recipient meets AFDC eligibility criteria, with *Meyers* v. *Juras*, 327 F. Supp. 759 (D. Ore.), affirmed by this Court, October 12, 1971, No. 71-63, this Term, in which the Court summarily affirmed a holding that states cannot terminate AFDC eligibility on the ground that the recipient mother refuses to sign a complaint against her husband in a state support proceeding. The lower court in *Meyers* placed considerable emphasis on the fact that in 1968 Congress enacted a number of detailed amendments to the provisions requiring states to seek contributions from persons legally responsible for the support of children receiving assistance (42 U.S.C. 602(a)(17), (18), (21), and (22)), as well as the work incentive referral requirements (*supra*, p. 4), but that Congress did not suggest at the time these vigorous inducements to encourage the support of AFDC recipients by legally responsible individuals were enacted that sanctions should be imposed on non-cooperating AFDC recipients. The court concluded that Congress did not intend the states to "develop support resources by threatening mothers and children with the withdrawal of AFDC benefits." 327 F. Supp. at 761.

that it considered the prompt payment requirement applicable with respect to persons eligible for assistance under the state plan. We believe that *King* v. *Smith* holds, at most, that state eligibility restrictions are impermissible if incompatible with the Congressional purposes and must be scrutinized with special care when they apply in areas where Congress has not specifically indicated that states have broad discretion.

II. The Colorado and California Limitations on AFDC Eligibility in Question Here Are Not Prohibited By The Social Security Act.

1. *The Colorado Provision.* In light of the views which we have expressed above and in *Alexander* and *Carter*, we believe that Colorado's AFDC plan, which does not provide aid to persons aged 16 and 17 who do not attend school, is a valid exercise of state discretion to define AFDC eligibility. As we pointed out in our brief in *Alexander* (pp. 16-18), Congress has repeatedly and expressly indicated in broadening the age and school attendance aspects of the dependent child definition that state adoption of these aspects of the definition is optional. In 1956, when Congress removed the school attendance requirement and made federal matching funds available for state assistance to all children under 18, the Senate Report stated that this change "would *permit* Federal sharing," (S. Rep. No. 2133, 84th Cong., 2d Sess. 30 (1956); emphasis supplied); since the Act requires the federal government to provide funds to match state payments under a qualified plan, the

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permissive language of the Senate Report can only mean that the amendment permits the payment of federal matching funds if the state chooses to include 16 and 17-year-olds who do not attend school.[7]

Although the Department considers it desirable for state AFDC plans to include needy children regardless of whether they attend school, and although the Department believes that this limitation may work considerable hardship in situations where it is difficult for a 16 or 17-year-old not attending school to obtain employment, we do not believe that the distinction for these purposes between school children and children not in school is irrational. To the extent that employment for children in this age bracket is available, the Colorado regulation appears to reflect that state's determination that an employable child is less likely to be needy; and to the extent that the regulation affects children who are unable to obtain employment, the regulation encourages these children to remain in school and thereby increase their employment opportunities. Neither of these policies, in our view, is inconsistent with the purposes of the Social Security Act.

Appellants in *Digesualdo* suggest two additional reasons why Colorado's school attendance requirement is inconsistent with the Social Security Act. First, they argue that the requirement is inconsistent with Section 402(a)(19)(A)(i), 42 U.S.C. 602(a)(19)

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[7] The legislative pronouncements accompanying other amendments in this area are even more explicit. See *Alexander* Br., pp. 16-18.

(A)(i), which requires that states refer 16 and 17-year-old children who are receiving AFDC benefits and who are not in school to work incentive (WIN) programs. Appellants reason that, since the states must refer children in this category to work incentive programs, it follows that they must provide them with AFDC coverage. The short answer to this contention is that WIN referral is required only in the case of children "receiving aid to families with dependent children," that is, only if the state has chosen to include children in this category in its AFDC plan.

Appellants also contend that the blanket exclusion of 16 and 17-year-olds not attending school violates Section 402(a)(7) of the Act, 42 U.S.C. § 602(a)(7), which requires that, in administering AFDC plans, states "shall, in determining need, take into consideration any other income and resources of any child * * * as well as any expenses reasonably attributable to the earning of any such income * * *." With respect to this provision, the Department has promulgated a regulation specifying that "in establishing financial eligibility" for AFDC payments "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 CFR § 233.20(a)(3)(ii), 34 Fed. Reg. 1395. Appellants reason that Section 402(a)(7), as implemented by the HEW regulation, precludes Colorado from excluding all 16 and 17-year-olds not in school as a class regardless of individual needs. The language of the statute and the regulation, however, indicate

merely that states shall take into account the actual income of a claimant in determining need only if that claimant is a member of a class otherwise included in the state's AFDC plan. These provisions do not preclude the states, as appellants suggest, from excluding a group of persons merely because that group is potentially eligible for matching funds under the federal definition.

2. *The California Provision.* California's exclusion of persons absent by virtue of military service from the definition of "continued absence," like the Indiana provision challenged in *Carter* (*supra*, p. 8), presents, in our view, a more difficult quetsion than does the Colorado provision under attack in *Digesualdo*. For, as we stated in our brief in *Carter* (pp. 29-30), though we believe that state discretion not to include all children covered by the federal definition of eligibility is applicable to the definition of the term "continued absence," there is, in marked contrast to the age and school attendance aspects of the definition, no legislative history indicating the scope Congress intended the states to have in defining the continued absence aspect of AFDC eligibilty.[8] Consequently, Congress has not manifested any intent that a restrictive state definition may be compatible with the Act's policies. On the other hand, as we pointed out in *Carter*, Congress' failure to define the federal standard of continued ab-

[8] But see 79 Cong. Rec. 9269 (1935) (suggesting that states may limit aid to cases of parental deprivation due to the death of a parent).

sence may indicate that the states were intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance.

HEW strongly encourages states to include dependent children whose parents are absent due to military service in their AFDC plans. Indeed, as the court below in *Carleson* pointed out (J.S. App. 3), HEW's Handbook of Public Assistance Administration, in discussing the term "continued absence" specifies that

> Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or other military service*, and imprisonment." HEW, Handbook of Public Assistance Administration, Part IV, § 3422.2 (emphasis added).

Although the Department does not believe that it is mandatory for the states to include for these purposes absences due to military service, we find some merit in the observation of the court below that military service may in many situations create a need as compelling as that suffered by other classes of persons eligible for AFDC assistance. Nonetheless, we believe that the California provision reflects a determination by that state that absences due to military service do not generally create the same degree of family disruption as does, for example, desertion of a parent, and that, in any event, the needs gen-

erated by military absence are more properly the responsibility of the military than of the states. (See appellants' J.S. in *Carleson*, pp. 14-15.) Though we consider the question to be a difficult one, we do not believe that this determination by California is an abuse of its discretion to define AFDC eligibility.[9]

[9] The court below held one other California qualification of the term "continued absence" to be inconsistent with the Act. In *Damico* v. *California*, No. 46538 (N.D. Calif., September 12, 1969), plaintiffs challenged the validity of a California welfare regulation which imposed a three-month waiting period for children deserted by a parent unless the remaining parent took legal action to terminate the marriage. The court held that the state's rigid time period was impermissible, although it acknowledged that use of a reasonable time period as a "rebuttable evidentiary guide" would be valid.

CONCLUSION

Although we believe that both of the state provisions limiting AFDC eligibility under attack in these cases are permissible exercises of state discretion under the Social Security Act, the questions presented in these cases are substantial and they warrant plenary consideration by this Court. In view of the close relationship between the questions presented in these cases and those currently pending for decision by the Court in *Alexander* and *Carter*, however, we suggest that it would be appropriate for the Court to withhold disposition of these cases until it has decided *Alexander* and *Carter*.

Respectfully submitted.

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DECEMBER 1971.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, ETC., ET AL.,
Appellants,

vs.

NANCY REMILLARD, ETC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES, REGULATIONS, OTHER AUTHORITIES

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OPINION BELOW

The opinions (majority and dissenting) and Order Granting Declaratory Judgment and Injunctive Relief issued by the three-judge United States District Court for the Northern District of California are reported at 325 F.Supp. 1272.

JURISDICTION

This is a direct appeal to the Supreme Court of the United States, pursuant to Title 28, United States Code sections 1253 and 2101(b), from the final decision of the three-judge District Court below which was convened in

compliance with Title 28, United States Code sections 2281 and 2284.

This case was brought in the court below by appellees on behalf of themselves and all others similarly situated for declaratory and injunctive relief pursuant to Title 28, United States Code sections 2201 and 2202 and Title 42, United States Code section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code section 1343(3). [A. 4-5] Since appellees sought to have enjoined a regulation, of statewide applicability, of the California Department of Social Welfare, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code sections 2281 and 2284.

The final judgment of the District Court — the Order Granting Declaratory Judgment and Injunctive Relief — was entered on March 31, 1971. Appellants' Notice of Appeal to this Court from that Order was filed in the District Court for the Northern District of California on April 7, 1971. The appeal was docketed in this Court on June 7, 1971 and probable jurisdiction was noted on January 10, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, according to the allegations of appellees [A. 10-11] and the intimations of the District Court [325 F.Supp. at 1274], the Fourteenth Amendment to the Constitution of the United States.

This case also involves certain provisions of the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394), among which, specifically involved are Title 42, United States Code sections 601, 602(a)(10), and 606(a).

Also involved in this case are federal and state administrative regulations—specifically, United States Department of Health, Education and Welfare (HEW), "Hand-

book of Public Assistance Administration" (hereinafter cited as "Handbook"), Part IV, section 3422, and California Department of Social Welfare Regulation EAS Section 42-350.

The text of each of these statutes and regulations is set forth in the Appendix attached to this brief.

QUESTIONS PRESENTED

1. Does the Social Security Act require that California, and all other states, grant "welfare" benefits [under the Aid to Families with Dependent Children program (42 U.S.C. §§ 601-10)] to families in which the father is "out of the home" in the course of his employment by the United States Government in military service?

2. Assuming the answer to the foregoing question to be in the negative, does the Fourteenth Amendment nonetheless require California, and all other states, to grant such "welfare" assistance to servicemen's families because of either equal protection or due process considerations arising out of the fact that the state grants AFDC benefits to families, *inter alia,* of prisoners and deportees?

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year-old child. [A. 5] Gregory Remillard, the husband of Nancy and father of Karen Marie Remillard, is on active duty in the United States Army, having enlisted therein in May 1969, and having reenlisted in March 1970 for a five-year term. [A. 8]

In September 1970, appellee Nancy Remillard applied to the Contra Costa County (California) Department of Social Services for assistance for her and her daughter under the Aid to Families with Dependent Children

(AFDC) program (42 U.S.C. §§ 601-10; Cal. Welf. & Inst. Code §§ 11200-488). [A. 9].

Mrs. Remillard's AFDC application was denied on the ground that Mr. Remillard's absence from the home was not a "continued absence" within the meaning of section 406(a) of the Social Security Act [42 U.S.C. § 606(a)]. The actual legal basis for the denial by Contra Costa County was California Department of Social Welfare Regulation EAS § 42.350.11 [A. 9] (see Appendix, p. A3, *infra,* for text) a regulation of statewide applicability, binding on all California counties (see Cal. Welf. & Inst. Code §§ 10553, 10554, 10600, 10604).

This action was commenced on October 21, 1970, wherein appellees, Mrs. Remillard and her daughter, on behalf of themselves and all others similarly situated,[1] sought a declaration of the invalidity, and an injunction restraining the enforcement, of EAS § 42-350.11 on the grounds that it was in conflict with the Social Security Act [A. 11] and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution [A. 10-11].

Appellants filed an Answer to the Complaint [A. 48] and moved for summary judgment in their favor [A. 52, 53, 80]. Appellees filed a cross-motion for summary judgment [A. 67, 68]. A three-judge court was convened pursuant to Title 28, United States Code sections 2281 and 2284, and heard the cross-motions for summary judgment and appellees' motion for declaratory and injunctive relief on February 25, 1971. It was stipulated at the oral argument that the matter could be submitted for a final decision.

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1. According to the Complaint, the plaintiff-appellee class is composed of "mothers and children, residents of the State of California, who have applied for payments under the AFDC program, who are otherwise entitled to such payments, but who have been denied such payments due to . . . [Regulation EAS § 42-350.11]." [A. 6]

On March 31, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Order Granting Declaratory Judgment and Injunctive Relief. 325 F.Supp. 1272. Appellants appeal from that Order.

ARGUMENT

I. Introduction.

The State of California participates (see Cal. Welf. & Inst. Code §§ 11200-488) in the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). Because of its decision to participate in that program, California must submit a "State Plan" to the Secretary of HEW for approval (42 U.S.C. §§ 601, 602, 603, 604), which plan must comply with the requirements of the Social Security Act and implementing regulations of HEW in order for California to be eligible for the receipt of federal funds. *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970).

This appeal involves the question of the validity of the provision in the HEW-approved California State Plan that provides that an otherwise "needy" child[2] is ineligible to receive AFDC benefits when a parent is absent from the home "in connection with . . . active duty in the Armed Services." California Department of Social Welfare Regulation EAS § 42.350.11. See Appendix, p. A4, *infra*.

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2. The determination of whether a child is "needy" is made by the State, which is free to set its own standards. *King v. Smith*, 392 U.S. 309, 318 & n.14. In California, "need" is determined according to State Department of Social Welfare regulations developed pursuant to California Welfare and Institutions Code section 11452. It must be noted, however, that this appeal does not raise any issues concerning California's "need standards." Appellees have not challenged those standards, nor have appellants denied that appellees are "needy" under California standards.

Under section 401 of the Social Security Act (42 U.S.C. § 601), provision is made for the granting of assistance to a "dependent child," who is defined in section 406(a) of the federal Act, insofar as pertinent here, as a "needy child . . . who has been deprived of parental support or care by reason of the death, *continued absence from the home,* or physical or mental incapacity of a parent" [42 U.S.C. § 606(a) (emphasis added).] See Appendix, p. A1, *infra.* Additionally, section 402(a)(10) of the federal Act requires that each participating state must provide "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10). See Appendix, p. A 1; *infra.*

The initial question in this appeal is whether California, in defining (Reg. EAS § 42-350.11, *supra*) "military orphans" to be ineligible for AFDC benefits, has acted consistently with the requirements of sections 406(a) and 402(a)(10), *supra,* of the Social Security Act. Assuming the answer to this question to be in the affirmative, there then arises the question whether the California "ineligibility policy" comports with due process and equal protection requirements of the Fourteenth Amendment.

In this brief, the statutory (or Supremacy Clause) question will be dealt with first in a two-stage process, in which the arguments presented are intended to be offered as alternatives. This approach appears appropriate in view of the uncertainty as to the intended scope of this Court's recent ruling in *Townsend v. Swank,* ..... U.S. ....., 92 S.Ct. 502 (1971).[3] Thus, it will be submitted, first, that *Townsend*

3. In *Townsend,* an Illinois AFDC statute and regulation were invalidated because they contained eligibility criteria which were drawn more narrowly than the eligibility standards mandated by Congress in the Social Security Act. The state laws specifically were held to be unconstitutional under the Supremacy Clause. 92 S.Ct. at 505.

disapproves of HEW's approach[4] of deferring to reasonable, state-determinations of eligiblity standards *only* when it is clear that Congress has imposed inflexible, mandatory national standards—a situation not present with respect to the definition of "continued absence" [42 U.S.C. § 606(a)] at issue here. Under this interpretation of *Townsend,* California would remain free to make its own determination of whether or not to include servicemen's families within its AFDC eligibility policies. HEW, "Handbook," Part IV, § 3422. See Appendix, p. A 2, *infra.*

In the alternative, however, if this Court intended *Townsend* to require national, uniform eligibility standards for *all* aspects of the AFDC program, then it is submitted that in this case this Court should pronounce the national standard to be that a child whose father is away from home on active military duty is *not* a "dependent child" within the meaning of the Social Security Act [42 U.S.C. § 606(a)], and thus, is not eligible to receive AFDC benefits.

II. The Social Security Act Does Not Require California to Treat a "Military Orphan" as a "Dependent Child" Eligible to Receive AFDC Benefits.

A. California Retains the Option to Define "Continued Absence" as Not Including a Father's Military-Duty Absence.

At the time that this case was briefed and argued in, and decided by, the District Court below, the status of the law, as pertinent here, was as follows:

Section 401 of the Social Security Act provided for the granting of AFDC benefits or assistance to a "dependent child." 42 U.S.C. § 601.

Section 406(a) of the Social Security Act defined a "dependent child" as a "needy child . . . who has been

4. See HEW's "Condition X" [45 C.F.R. §233.10(a)(1)(ii)]; Note, *Welfare's "Condition X,"* 76 Yale L.J. 1222 (1967).

deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . ." 42 U.S.C. § 606(a).

HEW interpreted "continued absence" strictly: the absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." HEW, "Handbook," Pt. IV, § 3422.2. As an example of the type of situation falling within its interpretation, HEW cited the case where the father, unannounced, deserts the family and disappears. *Id.*

Within the foregoing interpretation, however, as correctly noted by the District Court (325 F.Supp. at 1273), "[t]he precise definition of 'continued absence' rests with the States." HEW required only that within its "continued absence" guidelines, a state "will find it necessary to give consideration to such situations as divorce, . . . [etc.], employment away from home, service in the armed forces or other military service, and imprisonment." "Handbook," § 3422.2, *supra.*

Pursuant to the option granted (or requirement imposed) by HEW that each state develop its own "continued absence" definition, California and, according to one survey [see A. 72, 78-79], approximately twenty other states, had defined the term as *not* including military-service absence. HEW had approved that policy adopted by California; indeed in the Brief for the United States as Amicus Curiae filed in this case, it was expressly stated that California had acted within its discretion in developing its military-service ineligibility policy.

Within this legal frame of reference, the District Court nonetheless held that California has violated the federal Act and the HEW regulation by making an "across-the-board," group-determination of ineligibility for servicemen's families. See 325 F.Supp. at 1273. It is submitted that the District Court erred[5] in this regard, as is discussed *infra* at 13-14. However, consideration must be given first to the ramifications of the *Townsend* decision, *supra*, in terms of its effect on the legal framework, described above. We do not believe that that structure has been changed.[6]

On its face, it is submitted that *Townsend* is significantly distinguishable from this case. In that case, Illinois had defined AFDC-eligible dependent children to include 18-20-year-old high school or vocational school students, but not children of the same age group attending college. See 92 S.Ct. at 504 & n.1. On the other hand, Congress, in section 406(a)(2)(B) of the Social Security Act, had imposed a definitional standard in unequivocal, unambiguous language, that the group of eligible individuals was to include needy dependent children under the age of twenty-one who were students "regularly attending a school, college, or university, or regularly attending a course of vocation or technical training. . . ." 42 U.S.C. § 606(a)(2)(B).

Thus, with respect to eligibility in *Townsend*, Congress had provided the definitional content of the term "student".

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5. In the Government's amicus brief filed herein, HEW does not specifically state that the District Court misinterpreted the requirements of the Department's regulation (Handbook § 3422, *supra*). That conclusion appears inescapably implicit, however, in the Government's approval, expressed in the brief, of California's exercise of its conceded eligibility-policy discretion.

6. It should be pointed out in this regard that probable jurisdiction was noted in this case on January 10, 1972, almost three weeks after *Townsend* was decided on December 20, 1971.

It was unnecessary and inappropriate for the states (or for HEW[7]) to give interpretative substance to the term.[8]

Additionally, in *Townsend*, as was forcefully traced by the Court, there was considerable legislative history to establish the fact that "Congress meant to continue financial assistance for AFDC programs for the age group only in States that conformed their eligibility requirements to the federal eligibility standards." 92 S.Ct. 506. In other words, Congress had directed nationally-uniform implementation.

We believe that this case—and the provision of the Social Security Act in question—are completely different from *Townsend*. Indeed both HEW and appellees have articulated the distinctions. In the Government's amicus curiae brief filed in *Carter v. Stanton*, Oct. Term 1970, No. 70-5082, (at pages 20-21), it is stated on behalf of HEW that:

> "With respect to the 'continued absence' provision of Section 406(a) . . ., there is no legislative history which deals specifically *either* with *the meaning of the term* 'continued absence' *or* the *degree of state discretion to implement* that test of independence." (Emphasis added).

Similarly, appellees, in their Motion to Affirm filed herein (at pages 8-9), distinguished *Townsend* [and the similar case of *McClelland v. Shapiro*, 315 F.Supp. 484 (D. Conn. 1970)] in the identical respects as we distinguish it:

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7. As the Court stated in *Townsend*, with respect to "student" eligibility, there was no room for HEW's deferential "Condition X" policy to operate, since the precisely established Congressional standard precluded any variances. See 92 S.Ct. at 505 & n.3.

8. Similarly, in *King v. Smith*, 392 U.S. 309 (1968), Congress had used the term "parent" in the Social Security Act as a shorthand label. But the meaning or definitional content of the word-of-art had been made perfectly clear: it connoted a "breadwinner" who was legally obligated to support his children. *Id.* at 329. Thus, Alabama was foreclosed from defining Mrs. Smith's fleeting paramour as a "parent," since Congress had provided a contrary definition. *Id.* at 333.

> "[T]hose cases are clearly distinguishable. Those cases involve a section of 42 U.S.C. 606(a) different from that interpreted in *King v. Smith, supra,* and deal only with the question of the validity of a state's refusal to grant AFDC benefits on the basis of age restrictions which are narrower than those provided for by the Social Security Act [42 U.S.C. § 606(a)(2)]. They involve provisions of the Social Security Act which have been altered several times by Congress and which have a long legislative history as regards mandatory implementation by the states. By contrast, the 'continued absence from the home' element of 42 U.S.C. § 606(a) has remained unamended since the Act's original enactment in 1935." (Footnote omitted and bracketed material added).

Thus, all appear to agree that there is a lack of a Congressional definition of "continued absence," and in view of that void, we believe, there is also an easily understood, and logical, absence of any indicia of Congressionally-mandated nationally uniform implementation of that test of dependency and AFDC-eligibility.[9] *A priori,* then, the principal of *King v. Smith* (that a state, without Congressional authorization, may not exclude from eligibility those persons made eligible by Congress[10]) is totally inapplicable when, as here, Congress has failed to provide the eligibility definition (of "continued absence"). And, in the absence of such an eligibility definition, it is to beg the question to say that a state has breached its federally-imposed obligation to furnish aid with promptness "to all eligible individuals" [42 U.S.C. § 602(a)(10)].

Instead of having specified the standard of "continued absence" and mandated its implementation with national

9. Indeed, there exists a suggestion that Congress may have intended to allow states to eliminate entirely "continued absence" as an eligibility criterion. See 79 Cong. Rec. 9269 (1935).

10. See *Townsend v. Swank, supra,* 92 S.Ct. at 505.

uniformity, Congress left the term to the administrative interpretation of, and implementation by, HEW. And for the more than thirty-five-year history of the Social Security Act, Congress has left untouched not only the "continued absence" provision of the Act itself, but HEW's implementation thereof as well. In view of this lack of legislative disapproval [*cf. United States v. Shreveport Grain & Elev. Co.*, 287 U.S. 77, 84 (1932); 2 J. Sutherland, *Statutes and Statutory Construction* 525 (3d ed. F. Horack 1943)], it is submitted that HEW's longstanding policy should be accorded considerable deference and weight. *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

Turning then to the HEW regulation concerning "continued absence," and California's implementation thereof, the two are completely compatible—contrary to the holding of the District Court.

HEW has provided a "strict" interpretation of the "continued absence" facet of dependency, treating it as something akin to death in terms of the economic and social implications for the family: the absence must cause severe intrafamilial dissociation *and* must be of a nature which "*precludes* the parent's being counted on for support or care of the child." HEW, "Handbook," § 3422.2 (emphasis added). The federal agency's example of its own interpretation is where the father "has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return." *Id.*

"The precise definition of 'continued absence' rests with the States," as noted by the District Court. 325 F.Supp. at 1273. HEW requires only that within its interpretation (§ 3422, *supra*), each state, "in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, . . . [etc.], employment

away from home, service in the armed forces or other military service, and imprisonment." § 3422.2.

California has done exactly what HEW has directed—as manifested in its Regulation EAS § 42-350 (Appendix, p. A3, *infra*). Each of the situations noted in the HEW regulation has been "considered" by California and children in each of the groups are considered eligible (EAS § 42-350.2) except in three instances (EAS § 42-350.11), *i.e.*, when a parent is absent on "trips made in connection with current or prospective employment," or on "active duty in the Armed Services." Obviously, these are three of the situations which HEW requires the state to "consider:" *i.e.*, situations of "search for employment, employment away from home, service in the armed forces or other military service." Handbook § 3422.2.

However, the District Court has stated that California has improperly interpreted the HEW phrase "will . . . give consideration to . . . ." According to the lower court, California considers each applicant's situation individually in situations of "imprisonment, or temporary medical treatment, or parental separation," with "no across-the-board exclusion of any of these categories," but gives "a different kind of 'consideration' " to the military-service situation by judging the group, as a group, to be ineligible. 325 F.Supp. at 1273. In this regard, the District Court is in error. California gives consideration to *each* group, *as a group,* listed in the HEW regulation. A child whose father is imprisoned or has been deported or who has deserted the family is treated as eligible to receive AFDC, not because of his individual situation, but because he is a member of the group which has been determined to be eligible. Similarly, the child whose father is looking for work, or working, away from home or is in the military is deemed ineligible because

California has "given consideration" to those situations and adopted a policy of group ineligibility.

Furthermore, contrary to the District Court's determination (325 F.Supp. at 1273) HEW allows, and the decision in *Damico v. California,* No. 46538, (D.C.N.D. Cal. Sept. 12, 1969)[11] does not prohibit, this type of "consideration" and group-eligibility determination. *Damico* held, rather, that California, having "given consideration" to the situation postulated by HEW as "desertion or informal separation" (Handbook § 3422.2), and having decided that children in such situations are eligible to receive AFDC, the State could not then impose an absolute three-month waiting period as a requirement of establishing "deprivation" and eligibility. The problem in *Damico* was not that California had made a group ineligibility determination, as suggested by the District Court here (325 F.Supp. at 1273), but rather, that California was arbitrarily denying aid to children who were part of a group whom California had determined to be eligible. In contrast, here, California has made the determination which HEW allows it to make, that a father's absence on military duty does not, *per se,* give rise to dependency and AFDC eligibility.[12]

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11. This Court reversed the District Court in *Damico* on the question of exhaustion of state administrative remedies and remanded the matter. *Damico* v. *California,* 389 U.S. 416 (1967). On remand, the District Court invalidated statutory and regulatory provisions of California law which imposed a three-month waiting period for AFDC eligibility for children deserted by one parent unless the remaining parent took earlier legal action to terminate the marriage. The opinion of the District Court, dated September 12, 1969, is unpublished. However, since the District Court in this case placed considerable reliance on the District Court decision in *Damico,* excerpts from the *Damico* decision are set forth in Appendix E attached to the Jurisdictional Statement at pp. A25-29.

12. It should be noted that under the California regulation, military-duty absence, by itself, does not constitute "continued absence" which would trigger AFDC eligibility. However, if in conjunction with the military assignment, other factors, *e.g.,* a

The District Court, as a further basis for its invalidation of the California regulation, while purporting not to decide the constitutional issues presented,[13] nonetheless stated that "it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." 325 F.Supp. at 1274.

It is submitted that the District Court erred in allegedly basing its decision on an interpretation of the Social Security Act which it deemed necessary to avoid reaching supposedly grave substantive constitutional problems. The California regulation comports with the requirements of the Fourteenth Amendment.[14] Thus, while we do not quarrel with the rule that a statute should be construed in a fashion to avoid the necessity of passing upon constitutional issues (*Townsend v. Swank, supra,* 92 S.Ct. at 508), the principal may not be used as a ploy for *mis*construing a statute to avoid reaching non-existent constitutional problems.[15]

In summary, there is a complete dearth of authority for the proposition that the Social Security Act, or the valid implementing regulation of HEW, compels California to grant AFDC benefits to children whose fathers are away from home on military duty. Indeed, what evidence does

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breakup of the marriage, develop, the child would then become eligible to receive aid. California does consider other factors, but requires that there be something more than mere military-duty absence as the predicate for AFDC eligibility.

13. In their Complaint, appellees urged that the California regulation denied them equal protection and due process. [A.10-11]. The case was extensively briefed [A.26-32, 60-65, 74-77, 83-84] and argued below on those constitutional issues.

14. See Argument III, *infra.*

15. HEW shares the view that there is no Fourteenth Amendment defect in the challenged California regulation. Government's Amicus Brief herein at 4, n.2.

exist indicates a contrary Congressional intent[16] and in view of those indicia, it is reasonable for California to have adopted its ineligibility policy vis-a-vis "miltary orphans."

B. Alternatively, A Serviceman Is Not "Continuously Absent" and His Child Cannot Be Considered as an AFDC-Eligible Dependent Child.

The AFDC provisions of the Social Security Act were born out of the economc miseries of the Great Depression of the 1930's. Congress reacted particularly to the misfortunes of hungry children. See *King v. Smith, supra,* 392 U.S. at 327 & n.24. However, as this Court noted in *King v. Smith,* the AFDC program was severely limited in its purposes—both in its inception and as it remains today.

> "The AFDC program . . . was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* [* * *]
>
> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout

16. In the next succeeding subsection of this Argument, it will be pointed out that if this Court holds that there must be a uniform standard of "continued absence" eligibility, then concerning the absence of a serviceman, the determination should be of ineligibility. In terms of the general, overall Congressionally-enunciated purposes of AFDC, it would appear that "military orphans" were not intended to be included within its coverage.

the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear." *King v. Smith,* 392 U.S. 309, 328-29 (1968) (Footnotes omitted and emphasis added).

Thus, public assistance through AFDC "was intended to provide economic security for children," *id.* at 329, only in the limited family-situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similar type of substantial intra-familial dissociation, denominated by Congress as a "continued absence." Congress made clear that AFDC was *not* for the purpose of assisting children whose neediness was due to the inability of the family-breadwinner to support them because of the lack of a good job.

Significantly, appellees have not cited any authority in refutation of the foregoing proposition (or in support of the converse). They merely stress that they are "needy"—a point which appellants conceded in the District Court [see A. 54 n.1] and concede here (see n.2, *supra*). But "need" is only one of the prerequisites to eligibility.[17] The needy child must also be "dependent" [42 U.S.C. §§ 601, 606(a)] in order to be eligible.

Appellees do not demonstrate how or why they should be found to be "dependent." Rather, they beg that question and then, to complete the circular process, assert that California has violated section 402(a)(10) by denying aid to them as "eligible individuals" [42 U.S.C. § 602(a)(10)]. Presumably appellees are unable to fit themselves within

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17. One rebels at the notion that needs of children may ever be conidered an irrelevance. However, "a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance." *King v. Smith, supra,* 392 U.S. at 329. That is, in determining AFDC eligibility, "need" is not the sole criterion, nor is it the measure of the amount of assistance *unless* it exists as a result of "dependency."

that one limited group of "eligible" families—that in which the child lacks a "wage-earning" father. For to be sure, the military-father is a "breadwinner," in the employ of the United States of America. The "needs" of his children can best be met by Congress, "in its traditional solicitude for the soldier and his dependents" (District Court Opinion, 325 F.Supp. at 1274) through increased pay[18] and improved allotment procedures,[19] rather than out of the treasuries of the counties and states where the soldier's family happens to reside.[20]

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18. Indeed, Congress has recently enacted sweeping military pay raises which should relieve the "needs" of appellees. The Court may also take judicial notice, we believe, of the current efforts of Congress and the President to abolish the draft by recruiting an "all-volunteer" Army through incentives such as improved pay and benefits.

19. "The affidavits of . . . [appellees] which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility. . . . [Appellees'] attacks should be on the military establishment rather than on the Welfare Administration of the State of California." Dissenting Opinion Below of Conti, D.J., 325 F.Supp. at 1275.

20. It is important to bear in mind that the issue in this case is not limited to whether California must grant AFDC benefits to families of servicemen, who previously as civilians, were California residents, or who, upon completion of military tours, will resume or acquire California residency. Rather, the issue is whether every military-family which happens to be in California at a time when the father is "out of the home" must be considered as AFDC-eligible if there is a needy child present. The fiscal inequities inherent in a requirement of AFDC-eligibility for all such families are apparent. States such as California and Washington, because of geographic locale, are major embarkation points in conjunction with the war in Southeast Asia and in general with military activities in the Pacific Area. Literally thousands of military persons from elsewhere in the Nation have been ordered to report to the West Coast, from where they subsequently are ordered into the Vietnamese or Laotian jungles or onto a ship to patrol the Indian Ocean in furtherance of the Pentagon's determinations of *national* security. Their families are left on the West Coast to await their return. We do not believe that the taxpayers of the West Coast (or of any other area of the country) should be required to

In developing its eligibility policy, California has determined that a parent who is fully employed[21] and "out of the home" in connection with his employment—be it in a civilian[22] or military capacity—is not "continuously absent." The Social Security Act does not compel a contrary determination. And indeed, if the Social Security Act, as interpreted in *Townsend v. Swank,* compels all states to define "continued absence" uniformly, it is submitted that the California definition, which excludes servicemen, is the correct interpretation of the Act as its scope was carefully delimited in *King v. Smith, supra,* 392 U.S. at 328-29.

III. In Determining "Military Orphans" to Be Ineligible to Receive AFDC Benefits, California Does Not Run Afoul of the Fourteenth Amendment.

The District Court has held that the Social Security Act must be interpreted as requiring California to grant AFDC benefits to children whose fathers are in the military because a contrary construction "would raise serious questions under the equal protection and due process clauses of the Constitution." 325 F.Supp. at 1274. This bootstrap argument is unsound because there are no constitutional inhibitions against the exclusion of "military orphans" from AFDC benefits.

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pay a disproportionately large share of America's Southeast Asian War costs through AFDC subsidies to "military orphans." Moreover, the same must be said, with even more force, of the unequal financial burdens placed on the taxpayers of the West Coast *counties* in which lie major "shipping-out" points in connection with this country's Asian military activities.

21. California participates in the "AFDC-U" program (see 42 U.S.C. § 607)—the so-called "Unemployed Father" program. However, that program is not an issue here since we are concerned with *employed* fathers.

22. At the time of oral argument in the District Court, a question was raised as to whether California considered families eligible for AFDC when a parent was absent due to *civilian* employment. See 325 F.Supp. at 1273, n.3. The answer to the question appears in

The District Court did not "reach the Constitutional arguments advanced herein, but . . . [found] them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." *Id.* It is submitted that appellees' constitutional arguments are not compelling; indeed, they are totally without merit.

Appellees' equal protection argument as set forth in their Brief in Support of Motion for Preliminary Injunction is that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." [A. 26] They state that "it is difficult to imagine what basis the State could have for denying assistance to the needy families of absent servicemen when it grants the same assistance to the needy families of prisoners and deportees." [A. 27] Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other could not be so misapprehended by the District Court, nor could those differences so completely elude appellees.

Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security inuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children, but not prisoners' or deportees' children, is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a

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Regulation EAS § 42-350.11 (Appendix, p. A3, *infra*). California does *not* consider such families to be eligible.

father.[23] And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father may find employment in the country to which he is deported and choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing even approaching the social ostracism of imprisonment or deportation. In addition, not only is he employed, but employed by the Federal government, and extensive military "allotment" procedures exist as a means to "insure" that part of his pay ends up in the hands of his wife and children. See generally, U.S. Department of Defense, "Military Pay and Allowances Entitlement Manual." But see n.19, *supra*.

The dilemmas confronting appellees here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson* (D.C.N.D. Cal., No. 50965, Jan. 5, 1970), *aff'd* 400 U.S. 913 (1970).[24] Just as the regulations

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23. The District Court commented that in certain instances, military service may cause a considerable intra-familial disruption. 325 F.Supp. at 1274. Even assuming the correctness of that court's speculation, it does not follow that a violation of the equal protection clause has occurred by reason of such a fact. It is axiomatic that a classification which has some "reasonable basis" does not offend the Fourteenth Amendment simply because it "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). *Accord, Dandridge v. Williams*, 397 U.S. 471 (1970).

24. In *Macias*, the plaintiffs challenged the constitutionality of federal and California regulations in the AFDC-U program [the so-called "Unemployed Father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. This Court approved the Congressional differentiation between the "unemployed and the underemployed" and upheld the regulations.

in *Macias* drew a line between the unemployed and the underemployed, the California regulation here differentiates between the *un*employed *imprisoned* father and the *under*employed *serviceman* father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions for, underemployment are different from those for unemployment. *Cf. King v. Smith,* supra, 392 U.S. at 328-29. And "[t]he constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 (1940). The AFDC program is not designed to aid families of *under*employed "breadwinners," *King v. Smith, supra*; *Macias v. Richardson, supra,* and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). Appellants submit that the California regulation satisfies with ease the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

Yet, appellees have urged that the "traditional equal protection test" is inapplicable here and that rather, the more stringent "'compelling state interest' test of *Shapiro v. Thompson,* 394 U.S. 618 (1969), must be applied. Appellees' argument has been that one of the possible reasons for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." [A.27] They then urge such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. It is suggested that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" noted in *Shapiro v. Thompson, supra.* [A.27]; and see Appellees' Motion to Affirm at 16-17.

In *Dandridge v. Williams,* 397 U.S. 471 (1970), this Court held that the ordinary "any reasonable basis" standard applies in testing social welfare laws under the Equal Protection Clause. In an obvious attempt to avoid the implications of that ruling, appellees have transmogrified the *duty* or "obligation of the citizen to render military service," *The Selective Draft Law Cases,* 245 U.S. 366, 375 (1918), into an imaginary *right* to military service. Moreover, even assuming the existence of such a "right," it is not being infringed by the California regulation. Unlike *Shapiro,* where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve in the military that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus a "compelling" state interest need not be shown. *Cf. McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 806-808 (1969).

Dandridge v. Williams, supra, involved classifications affecting "the most basic economic needs of impoverished human beings." 397 U.S. at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

Appellees also asserted in the District Court [see A.30-32, 76-77], as they have here (Motion to Affirm at 17-19),[25] that California Regulation EAS § 42-350 constitutes "a denial of due process in that it embodies a conclusive presumption

25. In their Motion to Affirm, appellees, *for the first time,* alleged that California "has encroached upon the authority of Congress to raise and maintain its armies" (Mot. Aff. at 12) by adopting its policy of AFDC-ineligibility for serviceman's families. Appellees' argument seems convoluted, at best, since the very reason they claim to be eligible for AFDC is because the man in each of their respective families *is in fact in the Armed Services.* By that fact, it is eminently apparent that California has not encroached upon any exercise of Congressional military power; the men are in service.

that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." [A.32] Once again, however, appellees have assumed the ultimate conclusion (that they are eligible to receive AFDC) in making their basic due process assertion. In fact, the California non-eligibility policy is rational and in conformity with the Congressional purposes underlying the AFDC program of providing assistance to families who lack a breadwinner. *King v. Smith,* 392 U.S. 309 (1968).

Stripped to its essentials, appellees' due process contentions represent little more than an expression of their view that the exclusion of servicemen's children from AFDC eligibility manifests unsound policy. However, the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955). As this Court stated recently, "that era long ago passed into history. *Ferguson v. Skrupa,* 372 U.S. 726." *Dandridge v. Williams, supra,* 397 U.S. at 484-5.

CONCLUSION

Neither the Social Security Act nor the United States Constitution compels California to grant AFDC benefits to families in which the father is employed away from home by the Armed Services of the United States. In holding to the contrary, the District Court has erred. The court below should be reversed and should be directed to dismiss appellees' Complaint.

Respectfully submitted,

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Statutes and Regulations Involved

United States Code

42 U.S.C. § 601

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S. § 602(a)(10)

A State plan for aid and services to needy families with children must . . . provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 606(a)

The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt,

first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment....

HEW, "Handbook of Public Assistance Administration," Part IV

3422. *Continued Absence of the Parent from the Home*

3422.2 *Interpretation*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it neces-

sary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment.

California Department of Social Welfare, "Public Social Services Manual"

EAS 42-350 CONTINUED ABSENCE OF A PARENT

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

.12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 *Circumstances That Meet the Definition of "Continued Absence"*

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

.21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinement in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

.23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

.24 The court has issued an injunction forbidding the parent to visit the spouse or child.

.25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.

.26 Both parents are physically out of the home and their whereabouts are not known.

No. 70-250

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT B. CARLESON, ET AL., APPELLANTS

v.

NANCY REMILLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

Cases:

Statutes and regulations:

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. The Federal Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. 601-610, is one of six federally-aided public assistance programs established by the Social Security Act for various categories of needy persons.[1] Each of these pro-

[1] These programs are: Grants to States For Old-Age Assistance and Medical Assistance for the Aged, 42 U.S.C. 301,

grams is jointly financed by the states and the federal government and administered by the individual states or by political subdivisions under the supervision of the state. It is optional with each state whether it wishes to participate in any or all of the programs. If a state chooses to participate in one of the programs, it submits a plan of administration to the Secretary of Health, Education, and Welfare; if the plan meets the requirements set forth in the pertinent title of the Social Security Act, the Secretary approves the plan. The federal government then provides matching grants-in-aid to the state within the limits of the provisions of the Social Security Act setting forth the scope of federal financial participation.

For AFDC, the requirements for obtaining the Secretary's approval of a state plan are contained in Section 402 of the Social Security Act, 42 U.S.C. 602. Sections 406, 407, and 408 of the Act, 42 U.S.C. 606, 607, 608, define the class of persons in whose behalf the state may receive federal matching funds under the AFDC program. Section 402(b) provides that the Secretary "shall approve" any plan which fulfills the conditions specified in Section 402(a). One of those conditions is that AFDC "shall be furnished with

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et seq.; Aid to Families with Dependent Children, 42 U.S.C. 601-610; Grants to States For Aid to the Blind, 42 U.S.C. 1201, *et seq.*; Grants to States For Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351, *et seq.*; Grants to States for Aid to the Aged, Blind, or Disabled, 42 U.S.C. 1381, *et seq.*; Grants to States For Medical Assistance Programs, 42 U.S.C. 1396, *et seq.*

reasonable promptness to all eligible individuals." Section 402(a)(10), 42 U.S.C. 602(a)(10). Under this requirement, a state plan may not contain an "eligibility standard that excludes persons eligible for assistance under federal AFDC standards." *Townsend* v. *Swank*, No. 70-5021, decided December 20, 1971, slip op., p. 4.

Carleson is a class action by a two-year-old child and her mother, whose husband is away from home on active duty in the United States Army, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11. California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a needy child "deprived of parental support * * * by reason of the * * * continued absence from the home * * * of a parent" may be considered eligible for AFDC benefits. California Social Welfare Regulations EAS § 42-350.11 excludes absence due to "active duty in the Armed Services" from the definition of "continued absence" which California uses to test eligibility for AFDC benefits.[2] The majority of the three-judge court (Judge Conti dissenting) upheld the plaintiffs' contention that the Social Security Act does not permit a state to exclude as a group dependent children whose parents are absent due to military service, though it indicated that the

[2] At least 7 other states expressly deny AFDC where absence is due to military service. At least fourteen more states informally restrict AFDC payments in such cases. See *Stoddard* v. *Fisher*, 330 F. Supp. 566, 568 n. 2 (D. Maine).

state could provide for a case-by-case factual determination as to whether military service creates the need required to justify the payment of AFDC benefits.[3]

2. Before the Court noted probable jurisdiction in this case, the United States submitted, at the Court's invitation, a brief *amicus curiae* suggesting that this case and its companion, *Digesualdo* v. *Shea*, No. 70-5305, raised substantial questions of federal law warranting plenary consideration, but suggesting that the Court withhold disposition of these cases pending its decision in *Townsend* v. *Swank*, No. 70-5021, and *Carter* v. *Stanton*, No. 70-5082. With respect to the merits of *Carleson* and *Digesualdo*, we reiterated the position that we had previously taken in our brief *amicus curiae* in *Townsend*, *i.e.*, that the state restrictions on AFDC eligibility were valid, and that the Social Security Act does not require the states to provide AFDC benefits for all persons with respect to whom federal matching payments can be made.

On December 20, 1971, this Court rendered its decision in *Townsend*. The Court held that the Illinois regulation precluding the payment of AFDC benefits to 18-20 year-old children attending college, for whom federal matching funds had been made available through amendment to the Social Security Act, was invalid.

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[3] The court declined to rule on plaintiff's constitutional attack on the California regulation, though it noted that the "interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution" (J.S. App. 4).

On January 10, 1972, the Court ordered that the judgment in *Digesualdo*, which, like *Townsend*, involved a limitation on AFDC assistance based on age and school attendance, be vacated and that the case be remanded for further consideration in light of *Townsend*. At the same time the Court noted probable jurisdiction in the instant case.

This memorandum sets forth our view that *Townsend* ought not be applied to invalidate California's preclusion of AFDC benefits to families in which the parent is absent because of military service.

3. In *Townsend* v. *Swank*, after noting that children aged 18 to 20 attending college are eligible to receive federal matching funds under Section 406 (a) (2) (B) of the Social Security Act, the Court stated (slip op., p. 4):

> [A]t least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Another eligibility criterion for federal matching funds set forth in Section 406(a)(2) of the Social Security Act is the "continued absence" of a parent from the home. The Department of Health, Education, and Welfare has in the past allowed the states considerable discretion in determining what kinds of continued parental absence will result in AFDC eligi-

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CARD 5

bility.[4] Thus, although the Department has read the term "continued absence" to permit the payment of federal matching funds to families in which the requisite parental absence is due to military service, the Secretary has approved state plans such as California's, under which families in this category are not eligible for AFDC benefits.

In spite of the language in *Townsend* indicating that state AFDC plans are required to include persons eligible to receive federal matching funds, we believe that the California AFDC limitation under consideration in this case is distinguishable from the limitation held invalid in *Townsend*, and that the Court's holding in *Townsend* does not require the Court to hold the California provision invalid. The basic distinction between the two cases is that the restriction on aid to 18-20 year-old college students held invalid in *Townsend* conflicts with a provision of the Social Security Act which specifically declares persons in

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[4] The Department's regulations for federal matching provide that:

> Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously. [45 C.F.R. 233.90(c)(1)(iii).]

that category eligible for federal matching funds. In the Court's view, this specific provision reflects Congress' conclusion that the states should have no discretion to provide assistance to a class of children more narrowly defined in terms of age and school attendance.

In contrast to the specific provisions defining the age and school attendance aspects of AFDC eligibility, the Social Security Act does not elaborate on the scope of the term "continued absence." In our view, Congress' failure to define the federal standard applicable to this aspect of AFDC eligibility indicates that the states were intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance. Furthermore, the Court in *Townsend* found the Illinois restriction on AFDC in conflict with the Social Security Act not only because of the specific language in the Act covering the omitted category of children, but also because the legislative history of the amendment to the Act adding 18-20 year-old college students, in the Court's view, indicates a clear Congressional intent to require the states to provide assistance to the newly qualified class. By contrast, there is virtually no legislative history indicating either the scope of the federal standard of "continued absence" or whether the states are required to incorporate into their AFDC plans the broadest permissible reading of the term as used in the Social Security Act.[5]

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[5] The only indirect reference to the continued-absence criterion in the legislative history of the Social Security Act is a

4. If the Court construes *Townsend* to require states to extend AFDC coverage to all classes of persons for whom federal matching funds are available, even where the Social Security Act provides only a broad general standard of eligibility, the impact on the administration of the Act would be substantial. There are numerous general terms like the term "continued absence" involved here in the provisions of the Act setting forth eligibility criteria for federal matching funds, and if all state plans are required to implement these terms by providing coverage to the largest class of persons with respect to whom HEW approves the payment of federal matching funds, HEW believes that nearly every state plan will be in-

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statement by Senator Harrison, Chairman of the Senate Finance Committee:

> A State will not have to aid every child which it finds to be in need. Obviously, for many States that would be too large a burden. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives. The provisions are not for general relief of poor children but are designed to hold broken families together. [79 Cong. Rec. 9269 (1935).]

Although Senator Harrison's comment suggests a legislative sanction of state AFDC plans which make no provision at all for assistance to children deprived by reason of a parent's continued absence or his incapacity (as opposed to his death), this statement antedated Congress' decision to add what is now section 402(a)(10), 42 U.S.C. 602(a)(10), to the Social Security Act. That provision requires that AFDC "shall be furnished with reasonable promptness to all eligible individuals," and its addition may have altered the degree of permissible state discretion in implementing the definitional provisions of the Act. See *infra*, p. 9.

valid. This may well include not only AFDC plans, but state plans for administering the other public assistance programs established by the Social Security Act.

Each of the public assistance titles of the Act shares a common structure, in that each title contains a list of required state plan provisions,[6] as well as a set of definitional provisions setting forth the circumstances in which federal matching funds are available.[7] Moreover, each title contains the requirement, cited by the Court in *Townsend*, see slip opinion p. 5, in support of its holding that the age and school attendance eligibility provisions under consideration in that case were binding on the states, that assistance "shall be furnished with reasonable promptness to all eligible individuals."[8] In our view, therefore, application of the *Townsend* decision to this case could have a significant impact on the degree of flexibility HEW allows to the states in implementing numerous definitional provisions of the Act. These would include, for example, "physical or mental incapacity" of a parent under the AFDC title,[9] "blind" under the Aid for the Blind program,[10] "permanently and totally disabled" under the Aid for the Perma-

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[6] 42 U.S.C. 302, 602, 1202, 1352, 1382, 1396a.

[7] 42 U.S.C. 306, 606, 607, 608, 1206, 1355, 1385, 1396d.

[8] 42 U.S.C. 302(a)(8), 602(a)(10), 1202(a)(11), 1352(a)(10), 1382(a)(8), 1396a(a)(8).

[9] 42 U.S.C. 606(a).

[10] 42 U.S.C. 1201, *et seq.*

nently and Totally Disabled program,[11] the term "medical assistance" as used in the context of the medicaid program,[12] and many other areas in which HEW now allows the states discretion in providing assistance.

In our view, a sweeping change of this magnitude in the administration of the Social Security Act and the relationship of federal eligibility provisions to state plans is more appropriately left to the Congress. Indeed, the welfare reform bill currently under consideration in Congress, H.R. 1,[13] contains uniform provisions establishing federal eligibility criteria for assistance to needy families and to the needy aged, blind, and disabled.

5. Accordingly, we believe that the California regulation precluding AFDC assistance to families in which parental absence is due to military service ought to be judged according to the standard which HEW has traditionally applied in approving state plans; thus, if the classification reflected in the regulation is reasonable and not inconsistent with the purposes of the Act, the regulation ought to be held valid. We believe that the regulation reflects California's view that AFDC is designed primarily to assist families in which parental absence represents not simply a temporary physical separation of parent and child,

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[11] 42 U.S.C. 1351, *et seq.*

[12] 42 U.S.C. 1396, *et seq.*

[13] This bill has been passed by the House and is now being considered by the Senate Finance Committee.

but "a substantial severance of marital and family ties that deprives the child of at least one of its natural parents." Cal. Dep't. of Soc. Wel. Reg. EAS § 42-350.1. In California's view, such a severance exists where there is a "definite interruption of or marked reduction in marital * * * responsibilities and relationships compared to previously existing conditions." *Id.* Thus California excludes from its AFDC program children whose parents are away from home in connection with current or prospective employment, and military service is considered for these purposes a type of employment. Cal. Dept. of Soc. Wel. Reg. EAS § 42-350.11.

Although HEW encourages states to include dependent children whose parents are absent due to military service in their AFDC plans,[14] and recognizes the serious financial difficulties faced by many servicemen's families, we believe that California has made a reasonable judgment that absence due to employment, including military service, is not ordinarily as disruptive of the family structure and not as likely to result in the child's being deprived of parental support as absence due, for example, to parental desertion. Moreover, we believe that the regulation may also reflect California's view that the financial problems generated by absence of a parent due to military service are more properly the responsibility of the military pay and allotment system. We believe that both of these considerations are reasonable, and that

[14] See HEW, Handbook of Public Assistance Administration, Part IV, § 3422.2.

the regulation is not an abuse of California's discretion to define AFDC eligibility.

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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MARCH 1972.

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IN THE

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OCTOBER TERM, 1971

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Regulations, Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, *et al.*,
Appellants,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of California is reported at 325 F. Supp. 127.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Appellants.

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

This case involves Article I, Section 8, Article VI, Clause 2 and the Fourteenth Amendment of the Constitution of the United States. This case also involves certain provision of the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. Sections 301-1394), specifically, Title 42, United States Code Sections 601, 602(a)(10) and 606(a).

Also involved in this case are United States Department of Health, Education and Welfare "Handbook of Public Assistance Administration," part IV, Section 3422 and California Department of Social Welfare Regulation EAS Section 42-350.

The text of each of these statutes and regulations is set forth in the Appendix of Appellants' brief.

QUESTIONS PRESENTED

California State Department of Social Welfare Regulation No. EAS 42-350 prohibits the payment of welfare benefits under the Aid to Families with Dependent Children program (42 U.S.C. Sections 601-10) to otherwise eligible families where a parent is absent from his home due to military service. The questions presented are:

1. Whether EAS 42-350 is invalid under the Social Security Act and the Supremacy Clause of the United States Constitution.

2. Whether EAS 42-350 is invalid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether EAS 42-350 is invalid under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year old child. On May 31, 1969, Gregory Remillard, the husband of Nancy Remillard and the father of Karen Marie Remillard, enlisted in the United States Army. In March, 1970, he re-enlisted for five years. On July 2, 1970, he was sent to Vietnam where he was stationed for approximately one year. Nancy Remillard applied for Aid to Families with Dependent Children (AFDC) benefits on December 16, 1969. At that time, the amount of the monthly allotment Mrs. Remillard was receiving by virtue of her husband's military service was less than her "need" as computed by the California Department of Social Welfare and was less than the monthly AFDC grant an adult with one child receives in California. However, despite her obvious need, the Contra Costa County Department of Social Services refused to grant Mrs. Remillard AFDC benefits on the ground that California policy was to not consider military absence as "continued absence" so as to create the fiction that in the Remillard home there was no continued absence of a parent and therefore no "dependent child" eligible for AFDC benefits.[1] (A. 9, A. 16).

In September, 1970, Mrs. Remillard's Allotment check was stopped. On September 10, 1970, she again applied for AFDC benefits with the Contra Costa County Department of Social Services. Although she had absolutely no money, she was again denied AFDC benefits, this time on the basis of California State Department of Social Welfare Regulation No. EAS 42-350, which had been adopted earlier in the year and

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[1] The Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. Section 301-1394) provides for financial help to families with "dependent children." 42 U.S.C. 606(a) provides: "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent (and who is living with certain specified relatives and fulfills certain age requirements not in question here)."

which specifically prohibited the payment of AFDC benefits to needy families where the absence of a parent is due to military service (A. 9)

In October, 1970, the Red Cross, which had been working on Mrs. Remillard's case, informed her that they did not know when or if she would receive an allotment check. (A. 17)

On October 21, 1970, Mrs. Remillard, on behalf of herself and all others similarly situated, filed the action below seeking a declaration of the invalidity and an injunction restraining the enforcement of EAS 42-350 on the grounds that it was in conflict with the Social Security Act and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. (A. 10-11) At that time the Honorable Judge Wollenberg of the United States District Court for the Northern District of California issued a temporary order restraining appellants from denying AFDC benefits to the Remillard family on the basis Mr. Remillard's absence from the home for military service was not continued absence. (A. 37)

On January 20, 1971, Joyce Faye Dones, a member of the class represented by Mrs. Remillard, applied to the United States District Court for the Northern District of California for an order extending the temporary restraining order to her. (A. 39-40) Mrs. Dones, prior to October, 1970, lived with her husband and their two children. She was also expecting a third child to be born in January, 1971. While they were living together, Mr. Dones earned approximately $600.00 per month and supported his family. In October, 1970, Mr. Dones was drafted into the United States Army and sent to Fort Ord, California. When he left, the family had no money in the bank or property which could be sold to provide for living expenses. Because of her young children and her pregnancy, Mrs. Dones was unable to seek employment.

When Mrs. Dones did not receive her allotment check she applied for AFDC benefits with the Contra Costa County Department of Social Services. Her request was denied on the basis of EAS 42-350. Her first allotment check did not arrive until December 18, 1970. It was for $145.00. This amount is less than her "need" as computed by the California Department of Social Welfare and less than Mrs. Dones would have received in AFDC benefits if her husband had been absent from the home for a reason other than military service. (A. 41-44) On January 20, 1971, the Honorable Judge Wollenberg signed an order extending the temporary restraining order to Mrs. Dones. (A. 46)

On February 25, 1971, cross motions for summary judgment were heard before a three-judge court, convened pursuant to 28 U.S.C. 2281 and 2284. It was stipulated the matter could be submitted for a final decision.

On March 31, 1971, the three-judge court, in a 2-1 decision, issued an Order Granting Declaratory Judgment and enjoining the enforcement of EAS 42-350. (325 F. Supp. 1272) Appellants have appealed from this decision.

SUMMARY OF ARGUMENT

The Court below enjoined the enforcement of a state welfare regulation which prohibited the payment of AFDC benefits to needy families where the absence of a parent is due to his military service. Appellees argue that the decision below is correct and the regulation invalid on the following grounds:

1. Congress, in the Social Security Act, mandated that, in participating states, *all* needy children who are deprived of parental support by reason of a parent's continued absence be aided under the AFDC program; no exception was created for needy families where parental absence is due to military service. *Townsend v. Swank*, ___ U.S. ___; 92 S.C. 502 (1971) further mandates that, in the absence of clear congressional authorization, state welfare programs may not exclude persons eligible for assistance under federal AFDC standards. The California regulation is not authorized by

Congress and is invalid under the federal Social Security Act and the Supremacy Clause.

2. The California regulation is invalid under the Supremacy Clause as an encroachment upon the powers of Congress to provide for national defense.

3. The regulation, which grants AFDC to needy children who have a parent absent from the home because of incarceration, deportation, divorce, desertion or separation, while it denies such benefits to needy children who have a parent absent from the home because of military service, creates an irrational distinction, and is invalid under the Equal Protection Clause of the Fourteenth Amendment.

4. The regulation is invalid under the Due Process Clause of the Fourteenth Amendment in that it impinges upon a fundamental right in the absence of a compelling governmental interest; and in that it embodies a conclusive presumption that a person who is absent from his home due to military service is not continuously absent from the home, which presumption is arbitrary, capricious and irrational.

ARGUMENT

I. INTRODUCTION.

The categorical public assistance program of Aid to Families with Dependent Children (AFDC) operates through a federal grant-in-aid mechanism, being financed largely by the Federal Government and administered by the states. While participation by a state in the AFDC program is voluntary, if a state chooses to participate in the program (as all fifty states do) it must comply with the requirements of federal law (the Social Security Act of 1935, 49 Stat. 620, as amended 42 U.S.C. Sections 301-1394) and implementing regulations of the United States Department of Health, Education and Welfare [HEW] in order to be eligible for federal funds. *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

The category singled out for welfare assistance by AFDC is the "dependent child" who is defined in Section 406(a) of the Social Security Act [42 U.S.C. 606(a)] as a "needy child" . . . "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent (and who is living with one of several listed relatives and who fulfills certain age requirements.)"

Section 402(a)(10) of the Federal Act [42 U.S.C. 602(a)(10)] requires that each participating state must provide "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

At issue in this case is the validity of a California Department of Social Welfare Regulation[2] which states that no continued absence exists so as to qualify a child and his parent for AFDC benefits if the absence of the other parent is due to his military service. Appellee contends that such regulation is invalid under controlling federal law and the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. The three-judge court below did not decide the constitutional issues presented but found them "sufficiently compelling" to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California and held the regulation invalid and enjoined its enforcement.

II. CALIFORNIA'S EXCLUSION OF NEEDY "MILITARY ORPHANS" FROM AFDC BENEFITS VIOLATES THE FEDERAL SOCIAL SECURITY ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Townsend v. Swank, ___ U.S. ___. 92 Sup. Ct. 502 (1971), reaffirms the holding of *King v. Smith*, 392 U.S. 309 (1968), that "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social

[2]EAS Section 42-350.

Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is invalid under the Supremacy Clause." It further holds that regulations of the Department of Health, Education and Welfare that allow such state exclusions are invalid under the requirements of 402(a)(10) that aid be furnished to *all eligible* individuals.[3]

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[3]Insofar as *King v. Smith* needed any clarification, lower courts almost unanimously anticipated the ruling in *Townsend v. Swank*. The above principle was applied to numerous cases involving state infringement upon federal AFDC eligibility standards. *Woods v. Miller*, 318 F. Supp. 510 (W.D. Pa., 1970), state regulations providing for discontinuance of AFDC benefits to recipients who refused to file suit against responsible relatives contravened Social Security Act requirement that aid be furnished promptly to all eligible individuals and were invalid; *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa., 1970), state regulations providing for recovery of an overpayment by means of a reduction in subsequent grant payments invalid; federal duty imposed by 42 U.S.C. 602(a)(10) is breached if an otherwise eligible child is deprived of AFDC funds because of parental misconduct; *Doe v. Shapiro*, 302 F. Supp. 762, 764 (D. Conn. 1969), appeal dismissed for untimely filing, 396 U.S. 488 (1970), state regulation providing for termination of AFDC benefits to illegitimate children whose mothers refused to disclose the name of their father invalid in that it imposed an additional condition of eligibility that was not required by the Social Security Act; *Damico v. State of California*, CCH Pov. L. Rptr. No. 10,477 Nos. 46538, 48462 (N.D. Calif., Sept. 12, 1969), regulation that, in separation cases, there was no "continued absence from the home" unless the absence was for ninety days or legal action to dissolve the marriage had been instituted invalid; *Doe v. Hursh* (D. Minn., June 30, 1970) Civ. No. 4-64-463; *Stoddard v. Fisher*, 330 F. Supp. 566 (1971), state may not deny AFDC benefits to needy children of enlistees; *McCullough v. Hursh*, No. 4-71 Civ. 173 (D. Minn. July 6, 1971) (Opposition to Motion for Reinstatement of Stay of Injunctive Order, Exhibit B), state may not deny AFDC benefits to "military orphans;" *Linnane v. Betti*, 331 F. Supp. 868 (D. Vt., 1971); *Sterrett v. Grubb*, 315 F. Supp. 990 (N. D. Ind.), aff'd. 400 U.S. 922; *Martin v. Taylor* (N.D. Calif., May 24, 1971) aff'd.____ U.S.____ 40 L.W. 3262; *Weaver v. Doe*, 332 F. Supp. 61 (N.D. Ill.) aff'd.____ U.S.____, 92 S. Ct. 537. *Juras v. Meyers*, 327 F. Supp. 759 (D. Ore.) aff'd.____ U.S. ____, 92 S. Ct. 91; state may not, consistent with Social Security Act, condition AFDC payments on parent's cooperation in collection efforts.

The question presented for this court is twofold: 1) Are plaintiffs, and the members of their class, federally eligible for AFDC benefits? 2) If so, does the Social Security Act, or its legislative history, clearly evidence congressional authorization for states to exclude "military orphans" from AFDC benefits?

A. "Military Orphans" Are Federally Eligible for AFDC Benefits.

Throughout this case all parties have agreed that there is no question but that needy families in which a parent is absent from the home because of military service are federally eligible for AFDC benefits (A. 83; Jurisdictional Statement, page 9). There is no question but that federal monies are now available if a state chooses to furnish AFDC to needy families where parental absence is due to military service.[4] In spite of this previous agreement, appellant, in his brief (pages 16-19), argues for the first time that the Social Security Act precludes states from paying AFDC benefits to military orphans. Because of the enormity of this proposition[5] appellees will deal with this aspect of Appellant's argument first.

[4] At the hearing on the cross motion for summary judgment, plaintiff submitted statistics that twenty-four states and the District of Columbia do furnish AFDC benefits to servicemen's needy families; twenty states and Puerto Rico do not furnish AFDC benefits to the needy families of servicemen; two states limit aid to the families of draftees; two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft; information was not available for two states. (A. 72). See also, letter from Jules M. Berman, Chief, Division of Program Payment Standards, HEW, to Michael Weiss, Center on Social Welfare Policy & Law, (A. 33) and Brief for the United States as Amicus Curiae, page 15.

[5] Acceptance of this argument would necessarily entail the termination of AFDC benefits for those needy military families now receiving aid in twenty-four states and the District of Columbia, loss of funds to these states, and perhaps a profound effect on the economy of certain of these states (See Note 4). These families and these states are not represented before this Court except insofar as Appellees class now consists of needy persons who are receiving AFDC benefits pursuant to the decision below. When this case was filed, the class consisted of persons who were denied AFDC benefits (A. 6), and the questions presented for the Court were substantially different.

Appellees have no quarrel with the State's assertions that "the heart of any program for Social Security must be the child,"[6] and that

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[O]ne clearly distinguishable group of children' H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a 'breadwinner,' 'wage earner'; or 'father,' as the repeated use of these terms throughout the report of the President's Committee, Committee Hearings & Reports and the floor debate makes perfectly clear . . . A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent. *King v. Smith*, 392 U.S. 309, 328-329 (1968) (footnotes omitted).

Indeed, appellees would cite these same words to support the proposition that they are within the federal definition of "dependent children."

The Social Security Act quite clearly defines a dependent child as "a needy child who has been deprived of parental support or care by reason of . . . *continued absence from the home* . . . of a parent[7] (emphasis supplied). Appellant admits: "that the father is absent in this situation is clear." (Jurisdictional Statement, page 7). Where statutory language is clear and unambiguous that language should be enforced according to its terms. *Adams Express v. Kentucky*, 238 U.S. 190 (1915), *Caminetti v. United States*, 242 U.S. 470 (1917).

There is no language in the Social Security Act to indicate that when Congress said "continued absence from the home" it meant "continued absence from the home except by virtue of military service."[8] President Roosevelt, in recommending

[6] S. Rep. No. 628, 74th Cong., 1st Sess., 16-17 (1935) *King v. Smith*, 392 U.S. 309, 327 N. 24.

[7] 42 U.S.C. 606(a).

[8] Unlike much of Title IV, including other parts of Section 406(a) the 'continued absence from the home' element of that provision has remained unamended since the Act's original enactment in 1935.

the permanent entry of the federal government into the field of public assistance, referred to "children deprived of a father's support" as those who should be aided by a federal grant-in-aid program. Message of the President Recommending Legislation of Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 29 (1935). Similarly, the House Committee on Ways and Means referred in general terms to the beneficiaries of Title IV as "those (children) in families lacking a father's support," H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935) and the Senate Committee on Finance made reference to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong. 1st Sess. 12 (1935). (The Senate Committee went on to note that "these are principally families with female heads who are widowed, divorced, or deserted," id., but neither stated nor implied that eligibility by virtue of parental absence was to be limited to cases of divorce or desertion.)

Appellant has attempted to show that military families are not eligible for AFDC because military men are "breadwinners." However, whether or not the absent parent is actually a "breadwinner" within the meaning of the Act[9] is irrelevant as the family has been actually deprived of the

[9] *Kennedy v. State of Washington*, Wash. P.2d 154, 157 (1971) held, on grounds not argued in this case, that the state could not deny AFDC benefits to needy families where a parent was drafted into the military. That case noted:

> Employers ... ought not be permitted to look to tax-supported public assistance and public welfare programs as a means or source of supplemental income to their employer and as a device by which to maintain an inadequate wage system for regular gainful employment. Public Assistance should not become a subsidy for substandard employers.
>
> But (Mrs. Kennedy's) husband is not in private employment. He has little control over his family's economic destiny. He has no labor union or other agency to look to as a means of persuading his employer to pay him a living wage. He is without access to collective bargaining or any negotiating forum or other means of economic persuasion, or even the informal but concerted support of his fellow employees. He cannot quit his job and seek a better paying one.

[Footnote Continued]

presence and services of such "breadwinner" by his military service. (A. 16-17; 41-44)[10]

While Congress might rationally intend to help needy families with an unemployed or underemployed parent in the home by "the work relief program and . . . the revival of private industry" (S. Rep. No. 628, supra), it is irrational to assume that Congress intended that military orphans be denied AFDC benefits because of the existence of these programs. As pointed out by the Court in *Stoddard v. Fisher*,[11] "We cannot help but note the irony of a result which would deny assistance to the family of a man who finds that family disqualified from receiving AFDC on the ground that he has removed himself from the possibility of receiving public work relief by voluntarily undertaking, for inadequate compensation, the defense of his country."

The Department of Health, Education and Welfare, as the agency responsible for the implementation and administration of the AFDC program has never had any question as to whether military orphans are dependent children within the meaning of the Social Security Act.[12] While the Court has disapproved HEW's long standing policy of allowing states to

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[Footnote continued from preceding page]

> . . . And there is no action he could lawfully take to make his earnings adequate while putting in full time on his job. His was a kind of involuntary employment where legally he could do virtually nothing to improve the economic welfare of his family.

[10] See *Lewis v. Martin*, 397 U.S. 552 (1970), referring to the Act's basic purpose of providing aid to 'needy' children except where there is a 'breadwinner' *in the house* who can be expected to provide such aid himself (emphasis supplied).

[11] 330 F. Supp. 566, 571 N. 8.

[12] Section 3422 of the HEW Handbook of Public Assistance Administration provides:

> *3422. Continued absence of the parent from the home.*
>
> 3422.2 Interpretation-Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances;

[Footnote Continued]

vary AFDC eligibility requirements from federal standards,[13] it is submitted that HEW's interpretation of Section 406(a) as including military orphans within its coverage is due substantial weight.[14]

The federal Social Security Act commands in its clear language, by its legislative history, and through the administrative interpretation of HEW, that families in homes where a parent is absent because of his military service be granted AFDC benefits if otherwise eligible.

[Footnote continued from preceding page]

1. When the parent is out of the home.
2. When the nature of the absence is such as either to interrupt, or to terminate, the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and,
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support of the child . . .

A military orphan clearly comes within the above definition. However, Section 3422.2 further provides specifically:

Within this interpretation of continued absence, the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service and imprisonment.

See 45 C.F.R. 233.90(b), 35 Fed. Reg. 8788; 45 C.F.R. 203.10(a), 35 Fed. Reg. 8786.

[13] *King v. Smith*, 392 U.S. at 333 n. 34; *Townsend v. Swank*, ___ U.S. ___; 92 S.Ct. 502.

Note, Welfare's "Condition X" 76 Yale L.J. 1222 (1967).

[14] *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

B. There Is No Congressional Authorization for States To Exclude "Military Orphans" From AFDC Benefits.

Appellant argues that Congress has mandated that the term "continued absence" be administratively interpreted by HEW and that HEW's interpretation of the term is compatible with California's refusal to recognize "absence due to military service" as "continued absence." Appellant further argues that HEW may validly delegate to the states the decision as to what kind of absences will give rise to AFDC eligibility.

HEW's definition of "continued absence" quite clearly includes the father absent from his home because of military service.[15] The second argument ignores the clear language of *Townsend v. Swank*, "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act" (___ U.S. ___; 92 S.Ct. 502).

Appellant's contention that there is no "Congressionally mandated nationally uniform implementation of that (continued absence) test of dependency and AFDC eligibility" ignores the holding of *King v. Smith, supra.* In that case the state argued that its substitute father regulation simply defined who is a nonabsent "parent" under Section 406(a) of the Social Security Act (392 U.S. 317-318) as the State argues in this case that its military exclusion rule defines who is a "nonabsent parent" under the same section.

The *King* case dealt with the "transparent fiction" that a man who cohabited with a woman was a parent to that woman's children. This case deals with the "transparent fiction" that a man who, in reality, is absent from his home, is, under the state regulations, not absent. *King* dealt with this "fiction" by stating: [T]he Act clearly requires

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[15] See Notes 4, 12, *supra.*

participating states to furnish Aid to families with children who have a parent absent from the home . . . id. at 317.

The military service exception cannot be rationalized on other grounds. It is not a general exclusion from eligibility of families in which parental absence is voluntary, since the California regulation forbids AFDC payments to needy families of both enlistees and draftees and, furthermore, aid is granted in cases of voluntary absence due to separation, divorce, or desertion. Nor may the exception be viewed as a general exclusion of cases in which the absence is for a set time as opposed to an unknown time, as aid is granted in cases where a parent is in jail for a particular time period. Nor may the exception be viewed as a general exclusion of cases where the family is receiving some money as a result of the absent parent's activities, as a needy family where the absence of a parent is for reasons other than military service may also be receiving money from the absent parent. The absent parent may be fully employed and earning a comfortable salary; however, if the amount of money the family receives from an absent parent is below that family's "need" as determined by the California Department of Social Welfare, the Department will grant the family AFDC benefits in the amount of the difference between the family's "need" and the family's income. The Department will do this except where the absence of the parent is due to his military service.

Regulations must be analyzed in light of the paramount goal of AFDC, the protection of (dependent) children. *King v. Smith, supra* at 325. The question of deprivation "must focus on the child, not on the legal status of the parents." *Damico v. California, supra.* California's military service exception has the effect of carving out a group of children who come within the federal definition of "dependent child" set forth in Section 406(a) and denying them eligibility for something their parent has done, i.e., been drafted into or enlisted in the Armed Services. In California, needy children are granted AFDC benefits if they have a parent absent from the home because of divorce, separation, desertion, incarcera-

tion, deportation or hospitalization. In this case, Karen Marie Remillard was deprived of the presence of her father for more than a year. As appellant states in his brief, page 17, "Public assistance through AFDC 'was intended to provide economic security for children,' (*King v. Smith*) only in the limited family situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similar type of substantial intra-familial dissociation, denominated by Congress as a 'continued absence' ". In military cases there has been substantial intra-familial dissociation, as witness the plight of the Dones family which had their "breadwinner," earning $600.00 per month, removed from their home by the United States Government, sent to a place where the family could not join him, and which was then faced with the prospect of having no income for two months and only $145.00 per month after that. (A. 41-44)

Rather than leave the matter to the states, Congress did define the kind of absence that triggers AFDC eligibility. Any parental absence must be "continued" if the needy child is to receive assistance. Beyond that limitation, Congress has authorized no further narrowing of the class. Accordingly, *Townsend v. Swank, supra*, is controlling in this case, and 42 U.S.C. 601, 602(a)(10) and 606(a) and the Supremacy Clause of the Constitution command that California not exclude military orphans from AFDC benefits.[16]

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[16] The interaction of the Supremacy Clause with the Social Security Act is not needed to reach the same result under the concurring opinion of Chief Justice Berger in *Townsend v. Swank.*

III. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO NEEDY FAMILIES WHERE A PARENT IS ABSENT FROM THE HOME DUE TO HIS MILITARY SERVICE IS INVALID AS AN ENCROACHMENT UPON FEDERAL POWER TO PROVIDE FOR NATIONAL DEFENSE.

In the case of *Graham v. Richardson*, 403 U.S. 365, this court invalidated state statutes forbidding the payment of categorical aid to aliens as in violation of the equal protection clause of the Fourteenth Amendment and on the ground such statutes encroach upon the exclusive federal power over the entrance and residence of aliens. That decision held specifically that denial of welfare benefits was such an encroachment: "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with (these) overriding national policies in an area constitutionally entrusted to the Federal Government."

Article I, Sections 8 (11), (12), (13), (14), (15) and (16) of the United States Constitution provide that Congress has complete authority over the raising and maintaining of the United States Armed Services. In the absence of a clear mandate from Congress that AFDC benefits should not be paid to needy military families, appellee submits that Appellants have encroached upon the authority of Congress to raise and maintain its armies. As regards the Dones family, if Mr. Dones had refused induction and subsequently been imprisoned for this illegal act, there is no doubt that his family would have been eligible for AFDC benefits under California regulations. It is not entirely speculative that some men may choose to refuse induction rather than allow their families to live at starvation levels. Equally important, it is not unreasonable to assume that a soldier may not be able to perform his duties conscientiously if he is constantly worried about the well-being of his family. As there are approximately 43,000 military families with children that have an income below the poverty line, this is not a miniscule problem. United States Department of Commerce/Bureau of

the Census, *Current Population Reports*, Table E, 7, Table 11, 54 (1970); Laird, *Fiscal Year 1971, Defense Program and Budget*, 95 (1970). EAS 42-350 clearly encroaches upon federal power to raise and maintain armies and is therefore invalid.

IV. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED SERVICES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant disputes the District Court's finding that Appellee's constitutional arguments are compelling and suggests that they are unworthy of consideration. Although the court below based its decision on statutory grounds and avoided the constitutional issue, it is clear that the same result would have followed if the decision had been based on constitutional grounds. The effect of EAS 42-350 is to create two classes of needy families indistinguishable from each other except that one is composed of families in which a parent is absent by virtue of his service in the Military, and the other is composed of families in which parental absence stems from some other reason. Solely on the basis of this difference, the first class is denied and the second class is granted "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). Unless there is, at least, some rational reason to support this classification, it must fall as a violation of the Equal Protection Clause of the United States Constitution.[17]

[17] If this court should find that Congress intended that no military families be aided under the AFDC program, it must then determine if such action, which arbitrarily discriminates against like groups, is unconstitutional, as violative of the due process clause of the Fifth Amendment. *Bolling v. Sharp*, 347 U.S. 497 (1954). However, it has been demonstrated that, by itself, Section 406(a) has no such restrictive effect and the question presented is whether a state may, without viola-

In determining whether a state action violates the equal protection clause, courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. *McLaughlin v. Florida*, 379 U.S. 283, 288, (1964); *Carrington v. Rash*, 380 U.S. 89, (1965). The purposes of the AFDC program are set forth in Section 401 ". . . [T]he care of needy and dependent children in the home, the maintenance of family life, . . . the retention of the capability for self support." California Regulation EAS 42-350, does not further the purpose of the program by excluding from benefits one large group of families who are both needy and dependent under the Act, solely on the basis of the legal status of the absent parent.

The Equal Protection Clause requires people who are the same in fact to be treated the same in law. *Morey v. Dowd*, 354 U.S. 457 (1957); *Gulf, Colo. and Santa Fe v. Ellis*, 165 U.S. 150, 153, (1897). *King v. Smith, supra*, dictates that, in the AFDC program, the focus is on the child. As pointed out by the Court below, the state will help the needy child of a person whose incarceration may be as little as ninety days, the dependents of a divorced mother whose support payments from her absent husband are insufficient to meet basic needs, and the needy child whose parents have informally separated for but a few weeks, but nothing is given to the needy child of a soldier who, often involuntarily may remain away from home for as long as two years. 325 F. Supp. at 1274.

If a needy child's parents are "separated" and one parent is absent from the home because of military service, that child will be eligible for AFDC benefits although he has the same expectation of support from the military as is

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tion of the Equal Protection Clause of the Fourteenth Amendment, deny AFDC benefits to children on the grounds absence of a parent due to military service is not "continued absence" when it grants AFDC benefits to children who have a parent absent from the home for other reasons. Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorized the states to violate the Equal Protection Clause. *Shapiro v. Thompson, supra* at 641.

outlined in Appellant's Brief (page 21) as does the child who has a parent absent from the home because of military service but whose parents are not "separated." A regulation that so encourages legal separation of the parents does not "help maintain and strengthen family life" as required by Section 401, (See *Damico v. California, supra*) and does not "focus on the child."

Appellant's reliance on *Macias v. Richardson*, 324 F. Supp. 1252, affd. 400 U.S. 913 (1970) and the status of "underemployed" fathers is misplaced as the employment of an absent parent does not disqualify a needy child from AFDC benefits under Section 406(a) of the Act.[18] A parent separated from his family by separation or divorce may be fully employed and contributing to the support of the child; this employment will not disqualify a needy child from AFDC benefits. Further, Appellants attempt to distinguish military absence from other kinds of continued absence is misplaced. "Stigma" is not a necessary qualification for AFDC benefits and the economic condition of the members of Appellee's class is not in question (Appellants Brief, page 20). Congress mandated that all needy children deprived of parental support or care by the continued absence of that parent be eligible for AFDC benefits. Surely it matters naught to the Remillard child or the Dones children why their fathers are gone; all they know is that their fathers are not present to care for them. Appellee submits that there is no rational basis for distinguishing between a needy child whose parent is absent from the home because of separation, desertion, divorce, incarceration, hospitalization or deporta-

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[18] *Macias* dealt with the constitutionality of federal and state regulations in the AFDC-U ("Unemployed Father") program. 42 U.S.C. Section 607. One of the requirements of the AFDC-U program is that the father be present in the home. See Affidait of Katherine Hartwell, Motion to Vacate or Alter Stay, Exhibit B; Mrs. Hartwell, her husband and her child were terminated from AFDC-U benefits when Mr. Hartwell was drafted into the army. Appellees do not contend that they are eligible for benefits under the AFDC-U program.

tion and a needy child whose parent is absent because of military service.

Where a classification touches on a fundamental right, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (right to travel). See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate).

In *Carrington v. Rash, supra*, this court dealt with a Texas constitutional provision which provided that no serviceman could ever acquire a voting residence in the state so long as he remained in service. While other suspected transients such as students, patients in state hospitals and institutions, and civilian employees of the federal government could establish residency, a serviceman, no matter how long he had resided in the state and no matter what his domiciliary intentions were, could never controvert the presumption of non-residence. This Court in *Carrington* found this an invidious discrimination in violation of the Fourteenth Amendment. This case is very similar. The State of California has said that, no matter how long a serviceman is absent from his home, no matter where he is stationed, and no matter what kind of duty he is performing, his family cannot show that he is continually absent from the home.

Like the cases cited above, this case does not deal with a right that is spelled out in the Constitution. However, Appellee submits that there is a right to military service which invokes the "compelling state interest" test in analyzing state legislation which intrudes upon that right.

It has long been judicially recognized as self-evident that

> "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need . . ." *The Selective Service Draft Law Cases*, 245 U.S. 366, 375 (1918).

In *In Re Sien*, 284 F. 868, 869 (D. Mont., 1922) the Court stated:

> "The distinguishing and supreme obligation of citizenship and its permanent allegiance is military service. It has its antecedents in the feudal system wherein the vassal makes oath of fealty to his lord and services him in war, as consideration and payment for the land and protection he receives from his lord. So the citizen . . . likewise renders military service to the country in payment of and consideration for the advantages, rights and protections it extends to him."

The obligation of service being a necessary correlative of national citizenship, the right to fulfill that obligation without impediment by the state must be equally inherent in citizenship. See *Crandall v. State of Nevada*, 6 Wall. 35, 18 L.Ed. 744:

> "The people of these United States constitute one nation . . . This government has necessarily a capital established by law . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established."

And see *Edwards v. California*, 314 U.S. 160, 185 (1941), concurring opinion of Justice Jackson: "Rich or penniless, [Duncan's] citizenship under the Constitution pledges his strength to the defense of California as a part of the United States . . ."

Under the traditional "rational basis" test or the "compelling state interest" test a regulation that denies welfare benefits to needy families where a parent is absent due to military service while it grants welfare benefits to needy families where a parent is absent for other reasons violates

the equal protection clause of the Fourteenth Amendment of the United States Constitution.

V. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED SERVICES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Any law that clearly impinges upon a fundamental right must be shown to reflect a compelling governmental interest or it must fall under the due process clause of the Fourteenth Amendment. *Shapiro v. Thompson, supra.*

This Court has held the above statement applies to such diverse rights as: the right to travel (*Shapiro v. Thompson, supra*); right to marry (*Loving v. Virginia,* 388 U.S. 1); right to privacy (*Griswold v. Connecticut,* 381 U.S. 479); right to educate one's children as one chooses (*Pierce v. Society of Sisters,* 268 U.S. 510 [1925]); right to study the German language in a private school (*Meyer v. Nebraska,* 262 U.S. 390 [1923]); right to freely associate with other persons (*NAACP v. Alabama,* 357 U.S. 449 [1958]). It is submitted that the right to serve in the military is also such a fundamental right and that EAS 42-350, by infringing upon that right, violates the due process clause of the Fourteenth Amendment.

Furthermore, EAS 42-350 violates the due process clause of the Fourteenth Amendment in that it embodies a conclusive presumption that a parent who is absent from the home, due to his military service, is not continuously absent from the home, which presumption is arbitrary, capricious and irrational. See *Leary v. United States,* 395 U.S. 6 (1969); *Tot v. United States,* 319 U.S. 463 (1943); *Heiner v. Donnan,* 285 U.S. 312 (1932); *Schlesinger v. State of Wisconsin,* 270 U.S. 230 (1926); *Mobile, Jackson and Kansas Ry. Co. v. Turnipsent,* 219 U.S. 35, 43 (1910).

Appellee does not contend that every absence due to military service renders the serviceman's family eligible for AFDC benefits. She does contend that California's refusal to grant benefits to any needy families where a parent is absent because of military service is arbitrary and capricious and constitutes a denial of due process. Appellee, and the members of her class, are forever forbidden by EAS 42-350 from proving a fact which Appellant admits is true, that the father is absent in this situation (Jurisdictional Statement, page 7). While, in a particular situation it may be difficult to determine if a parent is continually absent, this does not justify California's refusal to grant AFDC payments to any family where a parent's absence is due to military service. To deny an applicant the opportunity to show that her children are "deprived" of parental support so as to qualify them for AFDC benefits because of an arbitrary presumption that has no rational connection with the facts of the situation is to deny that applicant due process of law.

CONCLUSION

The decision below is correct. The Social Security Act commands that states grant AFDC benefits to all eligible applicants. It is quite clear that Congress never intended that military orphans be denied AFDC benefits because of their father's status, and that state action which prohibits the payment of AFDC benefits to such families is invalid under the Social Security Act and the Supremacy Clause.

Further, any state regulation which provides for the payment of Welfare benefits to needy children deprived of parental support because of the parent's continued absence from the home for reasons other than military service while it prohibits payment of such benefits to needy children deprived of parental support because of the parent's con-

tinued absence from the home due to military service, violates the equal protection and due process clauses of the Fourteenth Amendment.

Respectfully submitted,

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March 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, *et al.*,

Appellants,

—against—

NANCY REMILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL WELFARE RIGHTS ORGANIZATION, THE NLSP CENTER ON SOCIAL WELFARE POLICY AND LAW, INC., AND THE AMERICAN VETERANS COMMITTEE, INC.

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INDEX

TABLE OF AUTHORITIES

Cases:

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Welfare Rights Organization, the NLSP Center on Social Welfare Policy and Law, Inc., and the American Veterans Committee, Inc. respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons also disclose the interest of the *amici*.

The *amici* wish to assure that the Court is presented with a complete discussion of the very important Social Security Act issues raised by this case in view of the impact on the financial security of thousands of welfare recipients and applicants around the country who are the families of the men who are serving in our Armed Forces. The manner in which this case is resolved may well affect many other welfare recipients and applicants who are not in the families of servicemen but who are eligible for bene-

fits under the principles announced by this Court in *Townsend* v. *Swank,* 404 U.S. 282 (1971). This possible effect, and the necessity for this *amicus* brief, became apparent only after the Solicitor General filed an *amicus* brief in this case on March 20, supporting appellants but filed after appellants had submitted their brief.* Because the United States' brief calls into serious question and, we believe, portrays a serious misunderstanding of, this Court's recent decision in *Townsend* v. *Swank, amici* believe that a further amplification of the statutory issues under the Social Security Act, and in particular a response to the United States' position, is essential to a full understanding of the case and its effect.

The National Welfare Rights Organization (NWRO) was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of NWRO includes more than 125,000 members in 50 states. Since many of its members have been, and continue to be, adversely affected by regulations which deny welfare benefits to families in violation of the requirements of the Social Security Act, the Organization has devoted much of its energies and resources to the abolition of such arbitrary rules. Members of NWRO have appeared as individual plaintiffs before this Court

* Moreover, we note that appellees' brief was due only a few days later, and thus appellees did not have an opportunity to respond to the Solicitor General. Recognizing that the motion and brief are being filed shortly before oral argument, *amici* mailed air mail special delivery a typewritten copy to both the appellants' and the appellees' counsel, as well as to the Solicitor General, at the same time that the final copy was delivered to the printer, April 4.

on many occasions; the Organization also submitted briefs *amici curiae* in *Lewis* v. *Martin,* 397 U.S. 552 (1970), and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). And, in the case most relevant to the issues in this case, *Townsend* v. *Swank,* attorneys for NWRO represented the successful appellants.

The NLSP Center on Social Welfare Policy and Law, Inc. is the specialized welfare law resource of the Legal Service Program of the Office of Economic Opportunity. The Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs and other legal organizations through education and assistance in the preparation of important litigation. Since its inception in 1965 Center attorneys have represented parties, and the Center has participated as *amicus curiae,* in this Court and the lower courts in cases involving all facets of welfare law. Specifically, the Center participated as *amicus* in this Court in *King* v. *Smith,* 392 U.S. 309 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970); *Dandridge* v. *Williams, supra,* and *Lewis* v. *Martin, supra;* and Center attorneys represented welfare clients before the Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Rosado* v. *Wyman,* 397 U.S. 397 (1970); and *Jefferson* v. *Hackney,* October Term, 1971, No. 70-5064, *sub judice.*

The American Veterans Committee, Inc. (AVC) is a nation-wide organization of servicemen and veterans who served honorably in the Armed Forces of the United States during World War I, World War II, the Korean Conflict, and the Vietnam Conflict, and who have associated themselves regardless of race, color, religion, sex or national

origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943, and has dedicated itself to the attainment of equal rights and opportunities for all citizens, whether rich or poor, servicemen or civilians. Among the many cases in which the AVC has filed briefs in this Court are *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Brown* v. *Board of Education*, 347 U.S. 483 (1953) and 349 U.S. 294 (1955); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Takahashi* v. *Fish and Game Commn.*, 334 U.S. 410 (1948); *Stainback* v. *Poe*, 336 U.S. 368 (1949); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); and *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, *et al.*,

Appellants,

—against—

NANCY REMILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE*

Introduction

In our view, the narrow question presented in this case is whether California may automatically disqualify for AFDC benefits otherwise eligible families solely because the father is continuously absent from the home as a result of service in the Armed Forces. None of the parties to the case has raised any question as to whether or not a state may determine that such service does not render the father continuously absent under the circumstances of a particular case, nor do we.

The appellants' answer to the question presented is set out in the alternative. First, they argue that the definition of "continued absence" as used in 42 U.S.C. §606 has been left by Congress to the states, and thus within that broad delegation California had the discretion under the Social

Security Act to exclude military absences. Second, appellants urge that if the definition of "continued absence" was not left to state discretion, then that phrase should be construed by the Court to exclude military absences from its scope. The Solicitor General, in his *amicus curiae* brief for the United States, assumes that Congress intended to *permit* military absences to be considered as "continued absences" under Title IV, but that the precise scope of the term was to be left to each state to determine.[1] This *amicus* brieffully supports the position of appellees, and will demonstrate that under this Court's decision in *Townsend* v. *Swank, supra,*[2] the *federal* standard of "continued absence" is controlling, and that Congress intended by the words "continued absence" to include within its terms *any* uninterrupted absence from the home. We believe that the clear wording of the statute, the legislative history, and the problem to which the Act was addressed, all point to the inclusion of military absences under the statute.

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[1] The Solicitor General has taken what has become his usual posture before this Court when representing the views of the Department of Health, Education and Welfare, namely, that prior decisions of the Court with which it does not agree, cannot possibly have been intended by the Court. Thus, in *Townsend* v. *Swank,* 404 U.S. 282 (1971), the Court was advised that the interpretation of 42 U.S.C. §§602(a)(10) and 606, in *King* v. *Smith,* 392 U.S. 309 (1968), should not be read as its plain language seemed to indicate, and in *Jefferson* v. *Hackney,* No. 70-5064, *sub judice,* the Court was told that its clear language in both *Rosado* v. *Wyman,* 397 U.S. 397 (1970) and *Dandridge* v. *Williams,* 397 U.S. 471 (1970), was *dicta* and not intended by the Court. And now, in the instant case, the *Townsend* decision, and its explicit repudiation of HEW's position, is wished away by the Government.

[2] The question in *Townsend* involved the consistency of Illinois' restriction of AFDC for children 18-20 years of age to those children attending high school or vocational school, with the Social Security Act, which includes college students in that age group as dependent children. The Court held that the federal definition was binding, and thus the Illinois restriction was void under the Supremacy Clause.

ARGUMENT

I.

This Court's decision in *Townsend* v. *Swank* requires that all children eligible for AFDC under *federal* criteria be granted assistance.

In *Townsend,* the Solicitor General argued that the Social Security Act permits the states to define eligibility in terms narrower than the statute's definition of dependent children, and that *King* v. *Smith* stood at most for the proposition that state eligibility restrictions are impermissible only if incompatible with articulated Congressional purposes or result in unreasonable classifications. Brief for the United States as Amicus Curiae, *Alexander* v. *Swank,* Nos. 70-5032, 70-5021, and *Carter* v. *Stanton,* No. 70-5082, dated August, 1971, pp. 10-12, 15. Thus the Government urged, in effect, the adoption of a presumption in favor of state options regarding AFDC coverage, with federal criteria governing only where explicit authority for such a limitation is found, or where the vague "condition (x)" or "equitable treatment" doctrine would so dictate. *Id.* at pp. 21-28.

In *Townsend,* however, the Government's position was expressly rejected by the Court:

> "*King* v. *Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC

standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." 404 U.S. at 286.

In so ruling, the Court reversed the proposed presumption. Eligibility for AFDC must be determined using *federal* standards unless evidence of a contrary Congressional intent is clearly shown for the particular exclusion.[3] The HEW "condition (x)" doctrine was disapproved insofar as it permitted the denial of AFDC to federally eligible individuals. *Ibid.*

In the instant case, the Government seeks to distinguish *Townsend* by arguing that in that case there was *specific* indication in the Act that college students were to be eligible, as well as legislative history indicating an intent to require their inclusion, and it was only that specificity and history which compelled the conclusion that states may not

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[3] This interpretation of *King* had been anticipated by many lower federal courts which had occasion to consider the question, see, *e.g.*, *Stoddard* v. *Fisher*, 330 F. Supp. 566 (D. Me. 1971); *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970); *Cooper* v. *Laupheimer*, 316 F. Supp. 364 (E.D. Pa. 1970); *Damico* v. *California*, 2 CCH Pov. L. Rep. ¶10,478 (N.D. Calif. Sept. 12, 1969); *Doe* v. *Hursh*, 328 F. Supp. 1360 (D. Minn. 1970); *Doe* v. *Schmidt*, 330 F. Supp. 159 (E.D. Wisc. 1971); *Saddler* v. *Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Taylor* v. *Martin*, 330 F. Supp. 85 (N.D. Calif.), *aff'd sub nom. Carleson* v. *Taylor*, 92 S. Ct. 446 (1971); *Woods* v. *Miller*, 318 F. Supp. 510 (W.D. Pa. 1970); *Arizona State Dept. of Public Welfare* v. *HEW*, 449 F.2d 456 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3399 (Feb. 22, 1972); *Doe* v. *Swank*, 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom. Weaver* v. *Doe*, 92 S. Ct. 537 (1971); *Meyers* v. *Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd*, 404 U.S. 803 (1971); but see *Digesualdo* v. *Shea*, —— F. Supp. ——, No. C-1827 (D. Colo. March 1, 1971), *vacated and remanded for further consideration in light of Townsend* v. *Swank*, 92 S. Ct. 688 (1972); and by at least one law review commentator, see Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of *King* v. *Smith*," 118 Penn. L. Rev. 1219 (1970).

more narrowly define eligibility in terms of school attendance. Memorandum for the United States as Amicus Curiae, dated March, 1972, pp. 6-7. On the other hand, in the Government's view, the Social Security Act does not "elaborate" on the scope of "continued absence," and there is allegedly no legislative history on the question of either its intended scope, or its mandatory nature. It is concluded by the Government, therefore, that states were thus "intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance." *Id.* at 7.

It should be immediately apparent that the Government's analysis of the question presented is identical to that which it proposed in *Townsend* and which was rejected, namely, a presumption in favor of state options and state flexibility absent specific mandates to the contrary. A fair reading of the *Townsend* opinion, and of *King* v. *Smith*, conclusively demonstrates that the general eligibility rule enunciated in those cases in no way depended upon the clarity or specificity of the Congressional will in regard to the particular eligibility issue involved, and that the Congressional purpose was looked to in those cases *only* to determine whether or not explicit authorization for state options justified departure from the general rule as to the applicability of federal eligibility standards [*Townsend*], and to determine the precise scope of the governing federal criteria [*King*].

First, the structure of the Court's opinion in *Townsend* itself negates the Government's interpretation of that decision. Section I of the decision, 404 U.S. at 285-86, deals *exclusively* with the Court's interpretation of §402 (a)(10), 42 U.S.C. §602(a)(10), requiring AFDC to be

"furnished with reasonable promptness to all eligible individuals." In that section the decision in *King* v. *Smith* was analyzed. The Court characterized *King* as involving the question of whether Alabama could treat a man who cohabited with a mother of needy dependent children as a nonabsent "parent" so as to disqualify such children for AFDC, since under such circumstances no "parent" would be "continually absent from the home" as required by §406(a), 42 U.S.C. §606(a). In *Townsend* the Court noted that in *King* it had invalidated this Alabama definition of "parent" since its inconsistency with the Court's interpretation of §406(a) meant that eligible children were denied aid in violation of §402(a)(10). *Townsend,* 404 U.S. at 286.[4] The Court concluded that *King* established the primacy of federal eligibility standards absent specific congressional authority for state departures therefrom. *Ibid.*

This initial section of the *Townsend* decision thus makes no reference whatsoever to the particulars of the eligibility issue involved in that case. Indeed, Section II of the *Townsend* decision begins as follows:

> *"It is next argued* that in the case of the 18-20-year-old needy dependent children, Congress authorized the States to vary eligibility requirements from federal standards." 404 U.S. at 287. (Emphasis added.)

It is here, for the first time, that the Court considered it relevant to look to the legislative history, 404 U.S. at 287-91,

[4] The Court's characterization of the *King* holding quoted from a passage in that opinion (392 U.S. at 333) which was relied on by appellants in *Townsend* in support of their argument that the Act imposes federal eligibility standards on the states. The Solicitor General's brief in that case (at p. 25) argued that that passage "was taken out of context and misinterpreted" by the *Townsend* appellants. Surely the Government's interpretation of *King,* not even cited in its brief in this case, has been repudiated.

and it did so *only* to determine if specific Congressional authorization for the departure from the general federal eligibility rule could be found so as to sanction state options. This latter discussion was not undertaken in order to formulate the general rule, however. *King* had already done that for the Court.

The nature of the precise issue presented in *King* also confirms our position that the eligibility rule set out in *Townsend* did not depend on the peculiar specificity of the provisions at issue in that case. Required for resolution in *King* was the meaning of the word "parent." The Court in *King* looked to the legislative history of the Social Security Act in order to decide what Congress intended by use of the word "parent," and concluded it meant only a person with a legal duty to support a needy child. Surely, the word "parent" is not so clear in its meaning to justify the conclusion that the federal standard is binding *merely because of the specificity of language used.* "Parent," after all, may or may not include "adoptive" parent, "step-parent," or "man assuming the role of a spouse," even assuming it does not reasonably include within its terms "substitute" parents. See, for example, *Lewis* v. *Martin*, 397 U.S. 552 (1970).[5]

Thus, if the Government's position in the instant case were correct, considering the lack of specificity to the word "parent," all that the legislative history in *King* would have required was a rule of law which prohibited federal

[5] For a listing of those states which at the time of the *Lewis* decision, and *after King*, were still assuming the availability of income from a stepparent or a man assuming the role of spouse as if they were in the same position as natural parents, see Brief *Amici Curiae* of the Center on Social Welfare Policy and Law, *et al.*, *Lewis* v. *Martin*, O.T. 1969, No. 829, appendix.

matching for payments to families with two adults residing at home who have child support obligations (i.e., the limits of federal matching), while maintaining state flexibility to *restrict* eligibility by defining "parent" more broadly than permitted by the federal criteria. Nothing in the legislative history reviewed by the Court, after all, indicated a Congressional command to aid *all* children with absent parents, as so defined. See *Stoddard* v. *Fisher, supra,* 330 F. Supp. at 570.

However, the Court did not rule that §406 merely delimited the extent of the availability of federal matching funds, but instead mandated that *all* children eligible under the federal criteria must be aided. *Ibid. King* thus compels affirmance of the judgment in this case, since it applies the federal standard in a case in which that standard was not "elaborated" upon in the statute. It is curious, that in articulating its position that states have broad options to define eligibility unless Congress has spoken to the contrary, the Government fails, as we have noted, to even cite *King* v. *Smith!*

Further evidence that the degree of Congressional elaboration on terms used in the definition of dependent child is irrelevant to the function which must be ascribed to that definition, may be gleaned from the expansion of that definition in 1961. In that year, §407, 42 U.S.C. §607, was added to the Act in order to include as a "dependent child" any needy child who meets the requirements of §406 and "who has been deprived of parental support or care by reason of the unemployment (as defined by the State)" of one of his parents. Pub. L. 87-31, §1, 75 Stat. 75.[6]

[6] In 1968 the term was restricted to include only children deprived of support or care by reason of the unemployment of their father. Pub. L. 90-248, §263(a).

While it is true that participation in this aspect of the AFDC program is clearly optional, 42 U.S.C. §607(b), it is noteworthy that the Congress felt it necessary to *specifically indicate* that the definition of the term "unemployment," an obviously ambiguous term susceptible of many possible interpretations,[7] was to be left to the states. It did not rely on the Government's theory of the Act proposed here, namely, that *all* terms not narrowly defined by Congress are left to state discretion. Indeed, the legislative history of that addition to the Act confirms that this grant of state discretion was an *unusual* one.

The Senate Report notes that:

> "The definition of the term 'unemployment' for the purposes of qualification for assistance under the bill is left to the states, just as the definition of 'need' has always been." S. Rep. No. 65, 1961 *U.S. Code Cong. and Admin. News*, p. 171.

Thus, state discretion to define the class of eligibles under §407, was compared to state latitude in defining need, latitude specifically granted the states in §401,[8] *not* to the discretion asserted in this case to define "continued absence," the parallel term to "unemployment" used to qualify the lack of support or care in §406.

Obviously, had Congress not included the term "as defined by the State" in §407, the natural consequence would have been a mandatory *federal* definition. When Congress wanted to depart from the general rule of federal eligibility

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[7] See, e.g., *Macias* v. *Finch*, 324 F. Supp. 1252 (N.D. Calif.), *aff'd*, 400 U.S. 913 (1970).

[8] *King* v. *Smith*, *supra*, 392 U.S. at 334; *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970).

criteria it surely knew how to do so unambiguously. In fact, doing so in 1961 with respect to "unemployment," was described by a later Congress, as a "major characteristic" of §407, responsible for "wide variations" in eligibility. Comm. on Finance, S. Rep. No. 744, 90th Cong., 1st Sess. (1967), p. 160.[9] Surely, then, the extent of state options to define "dependent child" suggested by the Government represents the unusual situation, applicable *only* where Congress has spoken specifically to the question.

While we do not concede that the term "continued absence" is in any way ambiguous, or subject to contrary interpretations, see point II, *infra*,[10] if in the judgment of the administering federal agency that is the case, its responsibility is to clarify the Congressional will, see, e.g., *Zuber* v. *Allen*, 396 U.S. 168, 197 (1969), and not abdicate that responsibility by passing it along to the states. Indeed, HEW did not find the Congressional command so unclear as to prevent it from defining standards for determining whether or not federal matching funds are to be made available on the basis of a "continued absence." See 45 C.F.R. §233.90(c)(1)(iii).

Moreover, the Department often finds it essential to the efficient administration of the AFDC program to clarify-

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[9] These remarks were made in connection with an amendment to §407 which now provides that the definition of "unemployment" is to be made by the Secretary of HEW. The Congress felt that the variations "worked to the detriment of the program." *Ibid.*

[10] Indeed, the plain meaning of "continued absence" is so apparent, that one can speak of a Congressional failure to "elaborate" only by first accepting the possibility that states may restrict the scope of the term. The particularization of acceptable reasons for a continued absence might well have called forth, under the doctrine of *ejusdem generis*, a judicial interpretation of the term that foreclosed its plain meaning, to wit, any and all continued absences.

Congressional terms apart from those used in §406. Thus, to cite only two examples, HEW has defined "earned income" as used in 42 U.S.C. §602(a)(8) as gross rather than net, see 45 C.F.R. §233.20(a)(7)(i), (a)(3)(iv)(a),[11] and "reasonable promptness" as used in 42 U.S.C. §602(a)(10) as thirty days, see 45 C.F.R. 206.10(a)(3).[12] None of these terms had self-evident meanings, but HEW exercised its responsibility, specifically delegated to it under 42 U.S.C. §1302,[13] to determine the meanings attributed to those phrases by the Congress. It has no less a responsibility, where it believes guidelines are necessary, to clarify the standards which must be followed in defining eligibility under §406.[14]

Finally, we must respond to the spectre of "sweeping changes" to the agency's administration of the program raised by the Solicitor General. The Government correctly points out that the equivalent to §402(a)(10) appears in each title of the Social Security Act, and each title follows

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[11] See *Connecticut State Dept. of Public Welfare* v. *HEW*, 448 F.2d 209 (2d Cir. 1971) and *Arizona State Dept. of Public Welfare* v. *HEW*, *supra*, in which HEW's interpretation was upheld.

[12] See *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971), in which this interpretation was upheld.

[13] Section 1302 provides that the Secretary of Health, Education and Welfare "shall make and publish such rules and regulations, not inconsistent with this [Act], as may be necessary to the efficient administration of the functions with which [he] is charged under [the Act]."

This delegation is a broad one. See *Thorpe* v. *Durham Housing Authority*, 393 U.S. 268 (1969).

[14] It is no answer that these statutory terms defined by HEW in mandatory terms appear in §402 rather than §406. The Government's argument in *Townsend* that the only mandatory requirements of the Act appear in §402, was obviously rejected by the Court, except insofar as §402(a)(10) is read to make the requirements of §406 mandatory.

the same general format as in Title IV,[15] and thus the *Townsend* decision may have a "significant impact on the degree of flexibility HEW allows to the states in implementing [the] definitional provisions of the Act." Memorandum of the United States, dated March 1972, p. 9. The extent of any such impact, however, must be determined on a case-by-case basis, and this Court should not conclude that an affirmance of the decision below will decide such questions.

Thus, if the legislative history should indicate, for example, that Congress expected that definitions of "blind" would be made by state governments, many of which probably already had such legal definitions in 1935, then *Townsend* would not compel a federal definition. On the other hand, if it should develop that Congress was silent with respect to the flexibility to be given the states under any particular provision, or Congressional intent cannot be discerned from the circumstances of the adoption of the particular provision, then the federal standard must govern, as it did in *King* and *Townsend*.[16] Any substantial departure from present administrative practice would merely be a consequence of the rejection by this Court in *Townsend* of the federal agency's failure to implement Congressional will. The battle to transform the Social Security Act from a grant-in-aid program into a revenue

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[15] Title I (OAA), Title IV (AFDC) and Title X (AB) were part of the original enactment in 1935. Title XIV (APTD) was added in 1950 at the same time as §402(a)(10) and its parallel provisions.

[16] For example, the APTD program was added to the Act at the same time as the addition of the disability segment to the Title II Social Security program was first considered. The phrase "permanently and totally disabled" was extensively discussed in connection therewith, and it would require an analysis of that history to determine the extent of state options in that situation.

sharing measure has already been lost by HEW. State control over the ultimate costs of the public assistance program must be exercised in relation to the level of benefits provided to eligible individuals, a matter totally within state domain, e.g., *Rosado* v. *Wyman, supra; Dandridge* v. *Williams, supra,* not by excluding a class of eligible individuals from the program, e.g., *King,* 392 U.S. at 334; *Townsend,* 404 U.S. at 291-92.

II.

Uninterrupted military absences are continued absences within the meaning of Section 406.

Apart from the question of whether states may automatically exclude military absences from the scope of "continued absence" as a basis for AFDC eligibility, it is clear that HEW has construed the Congressional use of that term as encompassing such absences within its terms. Thus its regulation defining the scope of available federal matching defines "continued absence" as being an absence of either parent from the child's home as long as that absence interrupts or terminates the "parent's functioning as a provider of maintenance, physical care, or guidance for the child" and its "known or indefinite duration . . . precludes counting on the parent's performance of his function in planning for the present support or care of the child." 45 C.F.R. §233.90(c)(1)(iii). The federal definition clearly states that for purposes of AFDC eligibility the parent may be absent "for *any* reason, and he may have left only recently or some time previously." *Ibid.* (Emphasis added.)

This federal standard has been used by the Department since the first years of the federal program, see *Handbook of Public Assistance Administration,* Pt. IV, §3422.2,[17] and has specifically included military service as an example of a "continued absence" within the terms of that definition. *Ibid.* The record in this case shows that 22 states aid families of all servicemen if otherwise eligible, while two states aid only draftees, and two others aid draftees and enlistees who did so to avoid the draft. Appendix, pp. 78-79.[18] We believe that an examination of the words of the statute, its legislative history, and the nature of the problem posed for needy families by military service, all demonstrate that HEW has correctly defined the proper scope to be afforded the term "continued absence."

As this Court noted on the same day as it decided *Townsend,* the judicial construction of a statute properly begins "by looking to the text itself." *United States* v. *Bass,* 404 U.S. 336, 339 (1971). Section 406 defines "dependent child" as a needy, age-qualified child "who has been *deprived of parental* support or *care* by reason of the death, *continued absence from the home,* or physical or mental incapacity of a parent. . . ." (emphasis added). 42 U.S.C. §606(a). A fair reading of that provision would lead to the assumption that Congress intended that *whenever* a needy child loses the in-home care of one of his parents for a period of time

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[17] This provision of the HEW *Handbook* has been quoted in full in appellants' brief at pp. A2-A3. This definition of "continued absence" has been used by the federal government for matching purposes since at least 1946 (the date appearing on our looseleaf version of the regulation), and perhaps earlier.

[18] Five states did not respond to the survey upon which this tabulation was based.

not expected to be interrupted by the parent's return to the home, he is qualified for AFDC.[19]

Appellants believe that Congress used the term "continued absence" to mean a "substantial intra-familial disassociation" (Br. 17). Their regulation reflects this by requiring that apart from a parent's physical absence from the home, "a substantial severance of marital and family ties" must be found before a child qualifies for AFDC. EAS 42-350.1. The situations appellants describe may be generally characterized as divorce, separation, abandonment or desertion. In our view, if this is what Congress meant by "continued absence," these commonly used words were readily available to express its purpose. What appellants seek to read into §406 "is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." *Addison* v. *Holly Hill*, 322 U.S. 607, 618 (1944). Indeed, Congress has frequently legislated in AFDC with the problem of the severance of family ties in mind, and in so doing it uses the common expressions for such situations. See, e.g., 42 U.S.C. §602(a)(17) (referring to AFDC children who have "been deserted or abandoned by [a] parent").

The circumstances under which Congress adopted the AFDC program in 1935 confirm the broad scope of "continued absence from the home" which is indicated by the plain meaning of its terms. Although the Solicitor General disclaims knowledge of any legislative history which bears upon the scope to be given to that term (Br. 7), we believe

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[19] "Continued" means "lasting or extending without interruption." Webster's Seventh New Collegiate Dictionary (1969), p. 181. "Absence" is the state of being "absent" or "not present or attending." *Id.* at 3. Thus, "continued absence from the home" means not being present in the home without interruption.

that its meaning can be readily discerned from an examination of the evolution of §406 in the original Social Security Act.

The original Administration proposal for AFDC defined "dependent child" to mean

> "children under the age of sixteen in their own homes, in which there is no adult person, other than one needed to care for the child or children, who is able to work and provide the family with a reasonable subsistence compatible with decency and health."

H.R. 4120, 74th Cong., 1st Sess. (1935), §203 of the proposed "Economic Security Act." The target of the President's program was thus simply stated to be needy families in homes with only one parent physically present. No eligibility requirement was proposed as to particular *reasons* which would have to be established for the presence of only a single parent in the home. This made sense in light of the philosophy behind the proposal, namely that the remaining parent must be freed from the wage-earning role (which would otherwise have been necessary in light of the family's below subsistence income) in order to provide the "physical and affectionate guardianship necessary, not alone to keep [the children] from falling into social misfortune, but more affirmatively to rear them into citizens capable of contribution to society." Report of the Committee on Economic Security (1935), p. 36. That philosophy is inconsistent with a limitation of the program to cases in which the parent is absent because of marital strife.

The House Committee on Ways and Means reported to the House a substantially modified version of the Presi-

dent's program. In the House bill (H.R. 7620), "dependent child" was defined to mean any

> "child under the age of sixteen who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in a residence maintained by *one or more* of such relatives as his or their own home." (Emphasis added.) Section 406 of proposed "Social Security Act."

Under the House bill, then, in order to qualify for aid the needy child had to be living with a near relative, but strikingly more liberal than the Administration's original proposal, was the inclusion of needy children in homes in which *both* parents were present. Such a bill, which passed the House, would have in effect been a general relief program for all needy families with children under 16 years of age had it been enacted.[20]

The proposed Act was again modified when it reached the Senate floor. The Finance Committee amended §406 to limit the definition of "dependent child" to include needy children under 16 living with a near relative only when the child "has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent." Under the Com-

[20] Despite the inclusion of intact families in H.R. 7620, the Committee Report indicates that a major concern of the House was the "families lacking a father's support. . . . Nearly ten per cent of all families on relief are without a potential breadwinner other than a mother whose time might best be devoted to the care of her young children." H. Rep. 615, 74th Cong., 1st Sess. (1935), p. 10. The Committee specifically noted that there were over 350,000 families on relief the head of which was a "widowed, separated, or divorced mother and whose other members were children under 16." *Ibid.* Nonetheless, the Committee, and the House, did not limit the proposed program to such families.

mittee proposal, which was accepted by the Senate and enacted into law, Pub. L. 74-271, 74th Cong., 1st Sess. (1935), §406, families in which both parents were healthy, and resided at home with the children, were rendered ineligible. The choice of the expression "continued absence from the home" was not accidental.

The Finance Committee described the beneficiaries of its proposal as "the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children." S. Rep. No. 628, 74th Cong., 1st Sess. (1935), p. 17.[21] These were the children who could "not be benefited through work programs or the revival of industry." *Ibid.* See *King* v. *Smith, supra,* 392 U.S. at 328. The Committee specifically noted that these families were "principally," but not exclusively, "families with female heads who are widowed, divorced, or deserted." S. Rep. No. 628, p. 17.

That the Senate was concerned with a far greater problem than marital dissolution is evident from the explanation for the confining amendment to the House bill offered by the Finance Committee:

> "'Dependent child' . . . by committee amendment, is further confined to only those . . . children who have been deprived of *either parental support or parental care* because a parent of the children has died, or is *continuously away from the home,* or is unable, due to physical or mental incapacity, to provide such support

[21] This language is remarkably similar to the statutory language proposed by the Administration in H.R. 4120, which, as we have shown, did not restrict the circumstances under which AFDC would be available except to require that there be "no adult person in the home other than one needed to care for the child."

> or care. Thus, if a baby's father were an imbecile, unable even to care for the baby at home, the baby would be a 'dependent child' even though it had a mother who had a job, for the baby would be *without normal parental care.*" (Emphasis added.) S. Rep. No. 628, p. 36.

This history indicates the following: first, that while recognizing that a large group of beneficiaries were lacking a father's support because of divorce or desertion, the committee targeted for assistance those children with a parent who was "continuously away from home," *without limitation;* second, and perhaps explaining this broad scope of coverage, the addition of the words "deprived of parental . . . care" was obviously important to the legislative purpose, and indicated Congress was concerned not only with the financial needs of the nation's children, but also their physical and emotional care.[22] This latter concern echoes the original proposal by the Administration and the recommendation of the Committee on Economic Security set out above, and focuses upon the *fact* that some needy children were deprived of parental care, not the underlying *reason* for such deprivation.

The bill as enacted, then, in rejecting the general relief approach of the House, nonetheless focused on a broad class of needy children, those deprived of "normal parental care" because one parent was either dead, incapacitated or not physically present in the home. There is no support in any

[22] Thus, the Committee believed a child eligible because he was "without normal parental care" when the father was in the home but incapacitated, even though the mother was employed. Surely the scope of "continued absence" must be read consistently with this view of the statutory purpose—*i.e.* all children deprived of "normal parental care" (because only one healthy parent lives at home) are eligible.

of this legislative history, as conceded by the Solicitor General (Br. 7), for HEW's view that states were intended to be given broad latitude in defining the scope of parental absences which would qualify needy families for AFDC. Under *Townsend,* then, the federal standard must govern. This history does support, however, the HEW regulation which considers parental absence for *any* reason to be acceptable, as long as such absence interrupts the "parent's functioning as a provider of maintenance, physical care, or guidance for the child," 45 C.F.R. 233.90(c)(1)(iii), and it confirms that children deprived of that support and care because of a father's military service are so included.

The typical problems faced by families in which the father is serving his country in the Armed Forces demonstrate why it would not make sense to judicially limit the broad scope which the plain meaning of "continued absence" would seem to require. These problems coincide with the very problem the 1935 Congress sought to remedy.

Thus, whether or not a particular father is drafted or enlists (perhaps in recognition that the draft will inevitably call),[23] the fact is that such service precludes him from remaining at home. Indeed, under applicable federal regulations, there are many duty stations at which a serviceman's family may not be with him[24] even if it chooses to dislocate and move nearby to his base.[25] This enforced absence obviously deprives the "military orphan" of his

[23] In fact, two states (Iowa and Vermont) limit AFDC in cases of military absences to families of draftees and enlistees who have enlisted to avoid the draft. Appendix, p. 79.

[24] Department of Army Regulation, AR 614-30.

[25] Such dislocation would involve, for example, taking children out of their usual school and separating them from their friends.

father's care, affection and guidance no less than if his father had deserted or separated from his mother, and thus he is deprived of "normal parental care" in the words of the Senate Finance Committee in 1935.[26]

The situation of the serviceman's family should be compared to the family of a convicted felon in California.

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[26] The Executive Branch recognizes the dislocation which can result to a family because of the removal of the father from the home and thus the President, as authorized by Congress in 50 U.S.C. App. §456(b), has provided for a deferment from military service for young men whose induction would result in "extreme hardship" to certain of their relatives who are dependent upon them for support. 32 C.F.R. §1622.30 (the so-called III-A deferment). In the consideration of such a dependency claim, any allowances which are payable by the United States to the dependents of such persons are to be taken into consideration, but the fact that they are payable is not by itself sufficient to remove the grounds for deferment even when the dependency is based upon financial considerations. Moreover, and more important to this case, where the claim of hardship is based upon other than financial considerations—for example, the deprivation of care supplied by the registrant to his dependents—the fact that such allowances are payable *"shall not* be deemed to remove the grounds for deferment," because such deprivation of care cannot be remedied by mere financial assistance to the dependents. 32 C.F.R. §1622.30; 50 U.S.C. App. §456(h). Indeed, until quite recently, one could be eligible for a hardship deferment merely by establishing that he was a father (or about to become a father sometime within the next nine months) and that he maintained a *bona fide* family relationship in his home with his child or children. 32 C.F.R. §1622.30(c). Hence the Government clearly acknowledges that the deprivation of care in and of itself can present a hardship to the family of a serviceman. It must be emphasized, however, that under selective service regulations a father must establish "extreme hardship" in order to become eligible for a III-A deferment, a burden which is difficult to establish. See, *e.g., United States ex rel. Wilkinson* v. *Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968).

Thus, in cases such as appellees', where deprivation of support *and* care is clearly substantial, but not "extreme," the child or children must suffer that deprivation. However, it is unlikely that Congress in providing for deferment from compulsory military service in cases of "extreme" hardship, would approve of an interpretation of §406 which is so restrictive as to deny subsistence benefits in cases of less severe, but substantial, deprivations.

Under the California definition, a parent is considered continually absent when "not legally able to return to the home because of confinement in penal or correctional institution." EAS 42-350.22. Obviously appellants themselves recognize that marital discord is irrelevant in determining whether or not there is a deprivation of parental care by virtue of the parent's absence from the home. The lack of logic behind the exclusion of military absences is not explained by reference to the prisoner's legal inability to return, for the serviceman suffers from the identical disability.[27] The absurdity of the exclusion is demonstrated by the fact that if a father receives a draft notice but refuses to submit to induction, thereby subjecting himself to a possible prison sentence, 50 U.S.C. App. §462, his family would qualify for AFDC.

In addition to the deprivation of normal parental care imposed on children by their father's military service, such service usually results in a deprivation of support as well, since woefully inadequate pay levels for enlisted men generally result in a lowering of the family's available income.[28] Indeed, Congressional committees, and the Pres-

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[27] The penalties for being absent without leave, or for desertion are serious. 10 U.S.C. §§885, 886.

[28] The basic pay level for enlisted men who have served less than four months (*i.e.*, new recruits) is $134.40 per month (little more than $1600 per year). Executive Order No. 11577, 36 Fed. Reg. 349 (January 8, 1971). For men (at the lowest rank) serving greater than four months but less than two years, the basic pay level is only $143.70 per month (little more than $1700 per year). *Ibid.* Under authority granted by Congress, 37 U.S.C. §701(d), the Secretary of the Army has authorized servicemen to "allot" from their pay for the support of their "dependents" a certain monthly sum which is then mailed directly to them. That amount is computed as follows: (1) a basic "quarters" allowance of $105 per month, regardless of the number of dependents, available only if

ident, have cited the necessity of servicemen's families seeking welfare in order to gain support for increases in military pay.[29] Congress could hardly be assumed to have excluded military absences *per se* from the term "continued absence," given the fact that military service is so often responsible for creating financial need.

The family faced with such a substantial decrease in its standard of living is in precisely the same situation as the needy family in which the parents are divorced or separated.[30] The mother must choose to deny her children the parental care they require in order to supplement their available, but substandard, income by employment,[31] or

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the serviceman makes an allotment of this allowance plus $40 per month, plus (2) the $40 per month (or any greater amount elected by the serviceman). See 50 U.S.C. App. §§2203, 2204 (The Dependents' Assistance Act of 1950, as amended by Pub. L. 92-129, §206, 85 Stat. 359). Thus, assuming an election to deduct $40 per month from his pay, the family of the serviceman will receive $145 per month, *regardless of its size.* (This may be compared to the AFDC standard of need in California for a family of four of $321 per month.) It is important to recognize that if the serviceman elects to make an allotment, his basic take-home pay is reduced by at least $40, and thus he receives only $93 (less than 4 months service) or $103 (less than 2 years service), hardly enough for his own needs.

[29] See, for example, Sen. Armed Services Comm., Report on H.R. 6531, S. Rep. No. 92-93, 1971, *U.S. Code Cong. & Admin. News,* 2129, 2180 [Supplemental Views of Messrs. Symington, Schweiker, and Hughes]; Message of the President, H. Doc. No. 91-324, 116 Cong. Rec. 12824, 12825 (1970).

[30] Assuming support payments are regularly sent to the mother and children, such a family still qualifies for AFDC if the amount of such support is less than the recognized level of "need" set by the state, although such actually available income is of course taken into consideration just as the amount of a military allotment is.

[31] While the current AFDC program permits states to require (when certain preconditions are met) mothers to accept suitable employment, it does so *only* when child care arrangements can be found which are adequate for the needs of the particular child. See 42 U.S.C. §§602(a)(15)(B), (19); 630 *et seq.*; 45 C.F.R.

remain at home and provide the needed care at severe financial loss.[32] As in the case of the "substitute father" owing the child no legal duty to support, the work relief program designed as the alternative to cash assistance could have been of no benefit to a family where the father is not present in the home, and unable to benefit therefrom. See *King* v. *Smith, supra,* 392 U.S. at 328; *Stoddard* v. *Fisher, supra,* 330 F. Supp. at 571 and n. 8.[33]

In sum, the net result of California's interpretation of "continued absence," which purports to focus on marital

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§220.35(a)(2)(v). Substantial federal funds have been made available since 1962 to facilitate the provision of such day care services, see, *e.g.*, 42 U.S.C. §§603(a)(3)(A); 622(a)(1)(C); 625, but it is well recognized that sufficient facilities are woefully lacking. See, *e.g.*, Comm. on Ways and Means, Report on H.R. 1, H. Rep. No. 92-231. 92nd Cong., 1st Sess. (1971), p. 166. Moreover, effective July 1972, mothers with children under six are *exempt* from this requirement, and states will be required to give first priority in placement of mothers in jobs to mothers who *volunteer*. 42 U.S.C. §§602(a)(19)(A), 633(a), as amended by P.L. 92-223, §3.

[32] Congress has attempted to relieve at least some of the financial dislocations caused by military service by its enactment of the Soldiers and Sailors Relief Act, 50 U.S.C. App. §501 *et seq.*, which provides for the suspension of the enforcement of civil liabilities in certain cases of persons who are in military service, in order to enable them to devote their entire energies to the defense of the nation. For example, one provision of this Act prohibits any eviction from premises which have an agreed rent of no more than $150 and which are occupied chiefly for dwelling purposes by the family of a serviceman while he is serving in the military. 50 U.S.C. App. §530. While this Act provides help to servicemen and their families in at least some instances, most of its provisions serve only to delay enforcement of civil liabilities until the serviceman's return home and so at best provide only temporary relief from the financial dislocations caused by military service.

[33] Indeed, while in service the fathers have no ability to bargain for adequate pay, obtain a second job, or look for a better one. Appellants' reliance on *Macias* v. *Finch, supra,* is thus misplaced. In addition, apart from the economic possibilities open to the "father in the house," his children are *not* deprived of his "parental care" as in the case of servicemen's families.

discord, rather than the financial and emotional needs of the children, is to separate needy children into two classes, distinguishable only with respect to the underlying reason for the parent's absence from the home. Congress, in establishing a program designed to provide "economic security and protection of *all* children deprived of parental support or care,"[34] *King*, 309 U.S. at 330, could hardly have intended "arbitrarily to leave one class of destitute children entirely without meaningful protection." *Ibid.*[35] Indeed, basing a classification on the parents, rather than the deprivation of the child, might well violate the equal protection clause, e.g., *Smith* v. *King*, 277 F. Supp. 31 (M.D. Ala. 1967), and such a construction of the federal statute ought to be avoided. *Townsend* v. *Swank*, 404 U.S. at 291.

We do not mean to suggest that military service *per se* should qualify families for AFDC. In some cases the service may be of very short duration (*e.g.*, summer National Guard duty), or the family may be able to easily, without severe dislocation, live at the place of service with the father (*e.g.*, assignment to a base reasonably close to home and schools). The question of "continued absence" *vel non*, however, like all other eligibility questions under the federal statute, must be decided on a case-by-case basis, taking into consideration all facts which bear upon satisfaction of

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[34] As this Court noted in *King*, Alabama's focus on the morality of the parents rather than the needs of the child was inconsistent with the Act since "protection of [dependent] children is the paramount goal of AFDC." 309 U.S. at 325.

[35] If California is particularly aggrieved by the problem of servicemen's families moving to the nearest point of embarcation, the remedy is not to distort the entire public assistance program by carving out an exception to the broad mandate of "continued absence," but rather a legislative one. Congress has legislated in the past to relieve communities suffering financial stress because of the presence of federal "enclaves," 20 U.S.C. §236 *et seq.*, and California may seek relief from that body, where its influence is substantial.

the *federal* criteria. Irrebuttable presumptions, such as the one California uses in defining active duty in the armed forces as a "temporary" absence, EAS 42-350.11,[36] are merely "transparent fictions," *King*, 392 U.S. at 334, which facilitate the state's avoidance of its responsibility to consider each case on its merits under the federal standards.[37]

CONCLUSION

The Court should affirm the judgment below and hold that the federal standard of "continued absence" is mandatory upon states participating in the AFDC program, and that such standard includes "military absences" within its scope.

Respectfully submitted,

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[36] Curiously, imprisonment, usually for a fixed period, is not considered "temporary." In any case, the statute says "continued" absence, *not "permanent."* Cf. 42 U.S.C. §1351 *et seq.* (APTD).

[37] Cf. *Damico* v. *California, supra; Doe* v. *Schmidt, supra.*

CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 70-250. Argued April 10, 1972—Decided June 7, 1972

This is a class action for injunctive and declaratory relief by a child and mother whose husband is away from home on military duty, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11, pursuant to which they had been denied Aid to Families With Dependent Children (AFDC) benefits. Though California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a dependent child "deprived of parental support . . . by reason of [a parent's] continued absence from the home," is deemed eligible for AFDC benefits, EAS § 42-350.11 excludes absence because of military service from the definition of "continued absence." The District Court granted the relief sought. *Held:* Section 402 (a) (10) of the Social Security Act imposes on each State participating in the AFDC program the requirement that benefits "shall be furnished with reasonable promptness to all eligible individuals." Under the Act the eligibility criterion of "continued absence" of a parent from the home means that the parent may be absent for any reason. Consequently, that criterion applies to one who is absent by reason of military service, and California's definition is invalid under the Supremacy Clause. Pp. 600-604.

325 F. Supp. 1272, affirmed.

DOUGLAS, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 604.

Jay S. Linderman, Deputy Attorney General of California, argued the cause for appellants. With him on the brief was *Evelle J. Younger*, Attorney General.

Carmen L. Massey, by appointment of the Court, 405 U. S. 951, argued the cause and filed a brief for appellees *pro hac vice*.

Solicitor General Griswold and *Richard B. Stone* filed a brief for the United States as *amicus curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellees are mother and child. The husband enlisted in the United States Army and served in Vietnam. The mother applied for Aid to Families with Dependent Children (AFDC) benefits at a time when the amount of the monthly allotment she received by virtue of her husband's military service was less than her "need" as computed by the California agency and less than the monthly AFDC grant an adult with one child receives in California. She was denied relief. Although the Social Security Act, 42 U. S. C. §§ 301–1394, grants aid to families with "dependent children," and includes in the term "dependent child" one "who has been deprived of parental support or care by reason of . . . continued absence from the home," 42 U. S. C. § 606 (a), California construed "continued absence" as not including military absence. It is unquestioned that her child is in fact "needy."

When the husband's allotment check was stopped, appellee again applied for AFDC benefits. She again was denied the benefits, this time because California had adopted a regulation [1] which specifically prohibited the payment of AFDC benefits to needy families where the absence of a parent was due to military service.

This action is a class action seeking a declaration of the invalidity of the regulation and an injunction re-

[1] Calif. Dept. Soc. Welfare Reg. EAS 42-350.11 provides that "continued absence" does not exist:

"When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services."

straining its enforcement on the ground that it conflicts with the Social Security Act and denies appellees the Fourteenth Amendment rights of due process and equal protection.

A three-judge District Court was convened and by a divided vote granted the relief sought. 325 F. Supp. 1272. The case is here by appeal. 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction, 404 U. S. 1013.

Section 402 (a)(10) of the Social Security Act, 42 U. S. C. § 602 (a)(10), places on each State participating in the AFDC program the requirement that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." "Eligibility," so defined, must be measured by federal standards. *King* v. *Smith*, 392 U. S. 309. There, we were faced with an Alabama regulation which defined a mother's paramour as a "parent" for § 606 (a)(1) purposes, thus permitting the State to deny AFDC benefits to needy dependent children on the theory that there was no parent who was continually absent from the home. We held that Congress had defined "parent" as a breadwinner who was legally obligated to support his children, and that Alabama was precluded from altering that federal standard. The importance of our holding was stressed in *Townsend* v. *Swank*, 404 U. S. 282, 286:

> "*King* v. *Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under *federal* AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." (Emphasis supplied.)

In *Townsend*, we also expressly disapproved the Department of Health, Education, and Welfare (HEW)

policy which permitted States to vary eligibility requirements from the federal standards without express or clearly implied congressional authorization. *Ibid.*

Townsend involved § 406 (a)(2)(B) of the Act, 42 U. S. C. § 606 (a)(2)(B), which includes in the definition of "dependent children" those "under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary [of HEW]) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." Illinois had defined AFDC eligible dependent children to include 18–20-year-old high school or vocational school children but not children of the same age group attending college. We held that § 606 (a)(2)(B) precluded that classification because it varied from the federal standard for needy dependent children. Involved in the present controversy is another eligibility criterion for federal matching funds set forth in the Act, namely the "continued absence" of a parent from the home. If California's definition conflicts with the federal criterion then it, too, is invalid under the Supremacy Clause.

HEW's regulations for federal matching funds provide [2] that:

> "Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these con-

[2] 45 CFR § 233.90 (c)(1)(iii).

ditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously."

The Solicitor General advises us that although HEW reads the term "continued absence" to permit the payment of federal matching funds to families where the parental absence is due to military service, it has approved state plans under which families in this category are not eligible for AFDC benefits.[3] HEW has included "service in the armed forces or other military service" as an example of a situation falling under the above definition of "continued absence." HEW Handbook of Public Assistance Administration, pt. IV, § 3422.2.

Our difficulty with that position is that "continued absence from the home" accurately describes a parent on active military duty. The House Report speaks of children "in families lacking a father's support," H. R. Rep. No. 615, 74th Cong., 1st Sess., 10, and the Senate Report refers to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong., 1st Sess., 17. While the Senate Report noted that "[t]hese are principally families with female heads who are widowed, divorced, or deserted," *ibid.*, it was not stated or implied that eligibility by virtue of a parent's "continued absence" was limited to cases of divorce or desertion.

We agree that "continued absence" connotes, as HEW says, that "the parent may be absent for any reason." We search the Act in vain, moreover, for any authority to make "continued absence" into an accordion-like concept, applicable to some parents because of "continued absence" but not to others.

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[3] The present record reveals that 22 States and the District of Columbia do furnish AFDC benefits to needy families of servicemen, while 19 States and Puerto Rico do not.

The presence of the parent in the home who has the legal obligation to support is the key to the AFDC program, *King* v. *Smith*, 392 U. S. at 327; *Lewis* v. *Martin*, 397 U. S. 552, 559. Congress looked to "work relief" programs and "the revival of private industry" to help the parent find the work needed to support the family. S. Rep. No. 628, *supra*, at 17, and the AFDC program was designed to meet a need unmet by depression-era programs aimed at providing work for breadwinners. *King* v. *Smith*, *supra*, at 328. That need was the protection of children in homes without such a breadwinner. *Ibid.* It is clear that "military orphans" are in this category, for, as stated by the Supreme Court of Washington, a man in the military service

> "[H]as little control over his family's economic destiny. He has no labor union or other agency to look to as a means of persuading his employer to pay him a living wage. He is without access to collective bargaining or any negotiating forum or other means of economic persuasion, or even the informal but concerted support of his fellow employees. He cannot quit his job and seek a better paying one. . . . [T]here is no action he could lawfully take to make his earnings adequate while putting in full time on his job. His was a kind of involuntary employment where legally he could do virtually nothing to improve the economic welfare of his family." *Kennedy* v. *Dept. of Public Assistance*, 79 Wash. 2d 728, 732–733, 489 P. 2d 154, 157.

Stoddard v. *Fisher*, 330 F. Supp. 566, held a Maine regulation invalid under the Supremacy Clause which denied AFDC aid where the father was continually absent because of his military service. Judge Coffin said:

> "We cannot help but note the irony of a result which would deny assistance to the family of a

man who finds that family disqualified from receiving AFDC on the ground that he has removed himself from the possibility of receiving public work relief by voluntarily undertaking, for inadequate compensation, the defense of his country." *Id.*, at 571 n. 8.

We cannot assume here, anymore than we could in *King* v. *Smith, supra,* that while Congress "intended to provide programs for the economic security and protection of *all* children," it also "intended arbitrarily to leave one class of destitute children entirely without meaningful protection." 392 U. S., at 330. We are especially confident Congress could not have designed an Act leaving uncared for an entire class who became "needy children" because their fathers were in the Armed Services defending their country.

We hold that there is no congressional authorization for States to exclude these so-called military orphans from AFDC benefits. Accordingly we affirm the judgment of the three-judge court.

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join in the opinion and judgment of the Court, but on the assumption, not expressly articulated in the opinion, that a State may administratively deduct from its total "need payment" such amount as is being paid to the dependents under the military allotment system. It would be curious, indeed, if two "pockets" of the same government would be required to make duplicating payments for welfare.

The administrative procedures to give effect to this process may be cumbersome, but the right of the State to avoid overlapping benefits for support should be clearly understood.